Central Law Journal.

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The law of libel, particularly as regards privileged communications, has recently come before the courts in two striking and somewhat novel cases. Weston v. Barnicoat, 56 N. E. Rep. 619, decided by the Supreme Judicial Court of Massachusetts, was an action brought against a member of an association of the type considered in Hartnett v. Association, 169 Mass. 229, 47 N. E. Rep. 1002, 38 L. R. A. 194, for using the machinery provided by the association's by-laws. The defendant made a claim against the plaintiff for the price of a granite monument, which the plaintiff declined to pay. The defendant thereupon notified the plaintiff that if the plaintiff did not pay he should report the plaintiff's name to the association, to be placed upon its records of those who did not pay their honest debts. The plaintiff not paying, the defendant notified the local secretary, and thereupon the plaintiff received a letter from the association urging him to settle or explain, with a threat of placing his name upon the record if he did not. The consequence of placing a name upon the record or blacklist was a boycott by the association, as the plaintiff was notified by a copy of the following by-law: "No member of this association shall quote prices or do any work, either directly or indirectly, for any person or persons whose name appears on the list." The plaintiff did not pay, and a little later his name was placed upon the list with the anticipated result, and with the effect of serious damage, at least, to the plaintiff's business. The plaintiff thereupon brought this action for causing the circulation of the report, and had a verdict. The case came before the supreme court on exceptions, which, in a very lucid opinion of Chief Justice Holmes, were overruled.

The most important point decided was that a false statement of a kind manifestly hurtful to a man in his credit and business, and intended to be so, is not privileged because made in obedience to the requirements of a voluntary association, of which defendant is a member, organized for the purpose of compelling, by a boycott, the satisfaction of its members' claims, to the exclusion of a resort to the courts.

The other case, State v. Hoskins, 80 N. W. Rep. 1063, decided by the Supreme Court of Iowa, involved the risk and duty of informing the public as to the character of candidates for public office. It appeared that a local newspaper, in good faith, published an article falsely charging a candidate for district judge with the crime of "fraudulently altering a public record." For this the editor was indicted for criminal libel and found guilty. On appeal he did not claim that the charge was true, but insisted that if he published the article "in good faith, believing it to be true and actuated by justifiable motive," he could not be convicted. In Iowa the truth can be shown in defense, provided the publication is made "with good motive and for justifiable ends." In affirming the conviction the court said: "To establish a qualified privilege, it must be shown that defendant believed the charge to be true, and published it in the discharge of some duty, and we may assume that it was a duty on his part to make known to the electors of the fourteenth judicial district the true character of a candidate for the office of district judge." The paper circulated outside of the fourteenth district and outside of the State, and the court held that the defendant was not privileged in "thus making known the charge to persons in no way interested in the judicial election."

The *New York Law Journal*, in the course of a review of this case, says that it concurs "in the opinion that the specific ground upon which this decision rested is narrow and shortsighted. If the privileged right to publish charges against a candidate for publish office in a newspaper be conceded under any circumstances, it is only in accord with common experience and common sense to infer that the publication will circulate to some extent outside of the particular district of the candidate's constituency. It would seem, therefore, that the Iowa court really dodged the essential question that was presented."

The *Harvard Law Review* says of the case: "Declining to discuss whether a charge against a candidate for office is privileged when made *bona fide* to protect the public in-

terests, the court rests its decision on the narrow ground that the publication was not confined to the district directly concerned. If the communication is privileged, the privilege ought not to be lost so long as a reasonable use is made of it. Hatch v. Lane, 105 Mass. 394. And it seems that it is not an unreasonable use to publish the communication in a paper which, in its circulation, reaches others than those directly interested. By the weight of authority, under no circumstances could such a false charge be privileged. Duncombe v. Daniell, 8 C. & P. 222; Commonwealth v. Clap, 4 Mass. 103; Sweeney v. Baker, 13 W. Va. 158. But there are a number of cases *contra:* Briggs v. Garrett, 111 Pa. St. 404; Marks v. Baker, 28 Minn. 162. The latter view seems preferable upon grounds of public policy. The public interests should be protected even at the risk of occasional injustice to the individual; and this is only possible under the more liberal rule. See 23 Am. Law Rev. 346."

NOTES OF IMPORTANT DECISIONS.

FIXTURES—RAILROAD TRACKS.—In Skinner v. Fort Wayne, etc. R. R., decided by the United States Circuit Court, District of Indiana, it was held that rails, ties, fish plates, etc., constituting the track of a railroad, laid down by a railroad company solely for use as a part of its entire line in its business as a common carrier, on land over which it has obtained an easement of right of way by grant from the owner of the fee, do not become annexed to the freehold, but remain personal property of the company after its easement has been extinguished by a sale of the land under a prior mortgage. The court said in part:

"The case of Graham v. Railroad Co., 36 Ind. 463, holds that, where a railroad company has, without the consent of the owner, entered upon land, and has built a depot and hotel thereon for railroad purposes, such structures become fixtures annexed to the freehold, and that in condemnation proceedings by the railroad company to acquire a right of way over the land it must pay for those structures as a part of the realty of the landowner. If this case were conceded to be a correct exposition of the law, it would not be controlling. But the case is unsound in principle, and is in conflict with the great weight of authority. A review of a few of these cases may not be unprofitable.

"Corwin v. Cowan, 12 Ohio St. 629, was a case where a canal company had acquired an easement over certain land for the construction of its canal. It had imbedded in the soil of its right of way materials used in building locks. Subsequently, by abandonment, the easement terminated. It was held that the materials so used remained personalty, and that the reversion of the easement to the owner of the inheritance did not carry with it the ownership of the materials used in the construction of the locks, and that they were never intended as annexations to the freehold, and, having been rightfully used in building the locks, they were removable as personal property.

"Wagner v. R. R. Co., 22 Ohio St. 563, was a case where a railroad company had acquired a right of way for its road over a certain parcel of land, and had built stone piers firmly imbedded in the soil of its right of way. The railroad company subsequently abandoned its purpose of completing its railroad. It was decided that these stone piers remained personal property; and that, as between the railroad company and the owner of the freehold, the company had the right of removal.

"Railroad Co. v. Morgan, 42 Kan. 23, 21 Pac. Rep. 809, 4 L. R. A. 284, was a case where a railroad company by mistake, and without the knowledge or consent of the landowner, dug a well, and put in a pump and boiler, which were attached to the soil of the landowner. After some years the railroad company discovered the mistake, and took steps to remove the pump and boiler. The owner of the land sought to enjoin such removal, on the ground that the pump and boiler were fixtures annexed to the soil. It was held that these articles were personalty, and that the railroad company had the right of removal without paying for them to the owner of the land.

"The case of Northern Cent. Ry. v. Canton Co. of Baltimore, 30 Md. 352, was replevin to recover the possession of a lot of iron rails, frogs, spikes and bolts, brought by the railway company against the Canton Company. The railroad had been laid under a parol license on the land of the Canton Company. The latter company had recovered the right of way in an action of ejectment, and under a writ of *habere facias possessionem*, possession of the right of way had been delivered to it by the sheriff. The court held that the rails and other articles remained personal property, and belonged to the railway company. The Supreme Court of Michigan had the same question before it in Railway Co. v. Dunlap, 47 Mich. 456, 11 N. W. Rep. 271. The court said:

" 'The railroad company, whether rightfully or wrongfully, laid its track while in possession, and with purpose entirely distinct from any use of the land as an isolated parcel. It would be absurd to apply to land so used, and to a railroad track laid on it, the technical rules which apply in some other cases to structures attached to the freehold. Whatever rule might apply in the case of abandonment, it is clear that the superstructure was never designed to be incorporated with the soil except for the purpose attending the possession,

and in proceeding to obtain legal and permanent right to occupy the land for this very purpose.'

"The court said that there would be no sense in compelling the railway company to buy its own property. The case of Ry. Co. v. Le Blanc, 74 Miss. 626, 21 South. Rep. 728, shortly stated, was this: A right of way on which a railroad track was wrongfully laid was sold at a tax sale, and the title so acquired was duly confirmed in the purchaser by appropriate judicial proceedings. The purchaser claimed that he became the owner of the rails laid down on the right of way as fixtures annexed to the soil. The court held that the rails were personalty, and did not pass by the sale of the right of way on which they had been wrongfully laid, nor by the judicial confirmation of the tax title. It was declared that the general rule that things annexed to the soil by trespassers belong to the owner of the freehold was not applicable as against a corporation having the right of eminent domain, where such corporation had wrongfully entered and made improvements for the public purpose for which it was created and given the right."

ILLEGAL COMBINATION—MONOPOLY.—In Gatzon v. Brening, 81 N. W. Rep. 1003, the Supreme Court of Wisconsin holds that a liveryman's association which prohibits any member thereof from doing business with any person who does not patronize its members exclusively, or from letting a hearse to a person for a funeral where the undertaker in charge patronizes non-union members, thus monopolizing business and stifling competition, is illegal, as against public policy. Justice Marshall, speaking for the court, said in part:

"This is an age of trusts and combinations of all sorts. There is clamor against them on the one hand, and for the privilege of combining upon the other, as if the law could be changed to fit the opinions and selfish ends of particular classes. There is clamor for laws to prevent combination, while law exists that condemns most of them, which is as old as the common law itself, and sufficiently severe to remedy much of the mischiefs complained of that are actual; yet violations of such law are so common, and the remedy it furnishes so seldom applied, that its very existence seems, in many quarters, to be little understood. In Reg. v. Druitt, 10 Cox, Cr. Cas. 593, it was held that any combination of persons to stifle and prevent the free use of labor and capital within legitimate bounds is unlawful, and that the law furnishes a remedy therefor. The liberty of a man's mind and will to say how he shall bestow himself and his means, his talents and his industry, is as much the subject of the law's protection as is his body.

"A combination to do an act tending necessarily to prejudice the public or oppress individuals by unjustly subjecting them to the power of the confederates and give effect to the purposes of the latter, whether of extortion or mischief, is unlawful. Bish. Cr. Law, § 177; Desty, Cr. Law, § 2; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173.

"Every agreement between two or more persons to accomplish a criminal or unlawful object, or a lawful object by criminal or unlawful means, is an unlawful conspiracy, and any person whose rights are injured by acts done in furtherance of such conspiracy, has his action at law for redress in damages.

"If an unlawful combination exist, it is none the less unlawful because existing under a self-imposed constitution and governed by by-laws, and because it conducts its operations in a public or semi-public way, asserting the right, in pursuit of its purposes, to interfere with individual liberty and with the public interests. In a proceeding for damages for wrongdoing by such a combination to the special injury of an individual, the constitution and by-laws of the association, and protests of its members of innocence of bad intent, and of adherence to the obligations of their association, however innocent may be its name, to prevent incurring its penalties, will constitute no protection whatever, as regards compensatory damages, to a person specially injured by overt acts of its members in pursuit of the purposes of the conspiracy.

"The union under consideration is within the condemnation of the common law rule that a combination of persons, natural or artificial, to restrict legitimate trade or commerce in any field, by hampering or destroying individual liberty, stifling competition or preventing the exercise of individual freedom to dispose of one's labor or capital according to his own free will, so long as the legal rights of other persons are not infringed upon, is unlawful. The limitations upon the rule are in the nature of exceptions to it to be shown by way of defense where the combination is shown to exist. If it is not so far-reaching, as regards effects upon the public, or time or place, or the benefits of the members are not so large, as to render the combination an unreasonable interference with trade or individual freedom, that will remove from it the stamp of illegality; yet overt, unlawful acts, by two or more members of the combination acting by agreement to carry out its purposes, will render the combination, as to them, unlawful. The plainest principles of public policy, as before indicated, condemn such a monopoly as was attempted in this case, and the conduct of the defendants to carry out the purposes of the combination was as clearly unlawful."

INFANTS—TORTS.—In Slayton v. Barry, 56 N. E. Rep. 574, it was held by the Supreme Judicial Court of Massachusetts that where an infant, by falsely representing himself to be of full age, induces another to sell him goods, the seller cannot maintain trover against him for the goods.

The court says: "The declaration in this case is in two counts. The second count is in trover

for the goods described in the first count. The first count alleges, in substance, that the defendant, intending to defraud the plaintiff, deceitfully and fraudulently represented to him that he was of full age, and thereby induced the plaintiff to sell and deliver to him the goods described, and, though often requested, had refused to pay for or return the goods, but had delivered them to persons unknown to the plaintiff. The case is here on exceptions to the refusal of the presiding judge to give certain instructions requested by the plaintiff, and to his ruling ordering a verdict for the defendant. The question is whether the plaintiff can maintain his action. He could not bring an action of contract, and so has brought an action of tort. The precise question presented has never been passed upon by this court. Merriam v. Cunningham, 11 Cush. 40, 43. In other jurisdictions it has been decided differently by different courts. We think that the weight of authority is against the right to maintain the action. Johnson v. Pie, 1 Lev. 169, 1 Sid. 258, 1 Keb. 905; Grove v. Nevill, 1 Keb. 778; Jennings v. Rundall, 8 Term R. 335; Green v. Greenbank, 2 Marsh. 485; Price v. Hewett, 8 Exch. 146; Wright v. Leonard, 11 C. B. (N. S.) 258; De Roo v. Foster, 12 C. B. (N. S.) 272; Gilson v. Spear, 38 Vt. 310; Nash v. Jewett, 61 Vt. 501, 18 Atl. Rep. 47, 4 L. R. A. 561; Ferguson v. Bobo, 54 Miss. 121; Brown v. Dunham, 1 Root, 272; Geer v. Hovey, *Id.* 179; Wilt v. Welsh, 6 Watts, 9; Burns v. Hill, 19 Ga. 22; Kilgore v. Jordan, 17 Tex. 341; Benj. Sales (6th Ed.), 23; Cooley, Torts (2d Ed.), 126; 2 Add. Torts, § 1314. See, *contra*, Fitts v. Hall, 9 N. H. 441; Eaton v. Hill, 50 N. H. 235; Hall v. Butterfield, 59 N. H. 354; Rice v. Boyer, 108 Ind. 472, 9 N. E. Rep. 420; Wallace v. Morss, 5 Hill, 391.

"The general rule is, of course, that infants are liable for their torts. Sikes v. Johnson, 16 Mass. 389; Homer v. Thwing, 3 Pick. 492; Shaw v. Coffin, 58 Me. 254; Vasse v. Smith, 6 Cranch, 226, 3 L. Ed. 207. But the rule is not an unlimited one. It is to be applied with due regard to the other equally well settled rule, that, with certain exceptions, they are not liable on their contracts; and the dominant consideration is not that of liability for their torts, but of protection from their contracts. The true rule seems to us to be as stated in Association v. Fairhurst, 9 Exch. 422, 429, where it was sought to hold a married woman for a fraudulent misrepresentation, namely: If the fraud 'is directly connected with the contract, * * * and is the means of effecting it, and parcel of the same transaction,' then the infant will not be liable in tort. The rule is stated in 2 Kent, Comm. (8th Ed.) § 241, as follows: 'The fraudulent act, to charge him [the infant], must be wholly tortious; and a matter arising *ex contractu*, though injected with fraud, cannot be changed into a tort in order to charge the infant in trover or case by a change in the form of the action.' In the present case it seems to us that the fraud on which the plaintiff relies was part and parcel of the contract, and directly connected with it. The plaintiff cannot maintain his action without showing that there was a contract, which he was induced to enter into by the defendant's fraudulent representations in regard to his capacity to contract, and that pursuant to that contract there was a sale and delivery of the goods in question. Whether, as an original proposition, it would be better if the rule were as laid down in Fitts v. Hall, *supra*, and Hall v. Butterfield, *supra*, in New Hampshire, and Rice v. Boyer, *supra*, in Indiana, we need not consider. The plaintiff relies on Homer v. Thwing, *supra*; Badger v. Phinney, 15 Mass. 359; and Walker v. Davis, 1 Gray 506. In Walker v. Davis, *supra*, there was no completed contract, and the title did not pass. The sale of the cow by the defendant operated, therefore, clearly, as a conversion. Badger v. Phinney, *supra*, was an action of replevin; and it was held that the property had not passed, or if it had, that it had revested in the plaintiff in consequence of the defendant's fraud. The plaintiff maintained his action independently of the contract. In Homer v. Thwing, *supra*, the tort was only incidentally connected with the contract of hiring. We think that the exceptions should be overruled."

WATER SUPPLY — FIRE PROTECTION — CONTRACTS.—In Knappman Whiting Co. v. Middlesex Water Co., 45 Atl. Rep. 692, decided by the Court of Errors and Appeals of New Jersey, it was held that a water company which unconditionally contracts to supply to a consumer water with pressure sufficient for fire purposes is liable for damages sustained by the consumer from fire in consequence of a failure in the water pressure, though the failure is due to a break in its pipes without the water company's fault. The court said in part:

"The principle underlying all these cases is that where the contract is express, as it is in this case—to furnish water with a pressure sufficient for fire purposes—to do a thing not unlawful, the contractor must perform it; and if, by some unforeseen accident the performance is prevented, he must pay damages for not doing it. No distinction is made between accidents that could be foreseen when the contract was entered into and those that could not have been foreseen. Where, from the result of such an accident, one of two innocent persons must sustain a loss, the law, as was said by Mr. Justice Whelpley, casts it upon him who has agreed to sustain it, or, rather, leaves it where the agreement of the parties has put it, and will not insert, for the benefit of one of the parties, by construction, an exception which the parties have, either by design or neglect, omitted to insert in their agreement. To this general rule there are three exceptions. I know of no other. They are stated in the English notes, 6 Eng. Ruling Cas. 611, as follows: First, where the subsequent impossibility is imposed by law; secondly, where the continued existence of something

essential to the performance is an implied condition of the contract; thirdly, in contracts for personal services, in which there is generally the implied condition that the person who is to render the service is alive and not incapacitated by illness. The first of these exceptions exists where there is a declaration of war between two countries, of which the parties severally were inhabitants, which made the performance of the contract illegal. Esposito v. Bowden, 7 El. & Bl. 763; Hillyard v. Insurance Co., 35 N. J. Law, 415-422. *Id.*, 37 N. J. Law, 444. The second exception is illustrated in the case of Taylor v. Caldwell. The defendant in that case agreed to let certain gardens and a music hall to the plaintiffs for four specified days to come for the purpose of giving a series of concerts. After the agreement was entered into, and before the day arrived for the first concert, the music hall was accidentally destroyed by fire. It was held that, as the existence of the hall was necessary for the performance of the contract, the defendants were excused from liability in respect to its performance, and that no action would lie against them. In that case the agreement was wholly executory, and the result is placed by Mr. Justice Blackburn on the principle that 'where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfillment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continued existence as the foundation of what was to be done.' 3 Best & S. 826; 6 Ruling Cas. 603. This doctrine was applied in the Supreme Court of New York to an executory contract for the sale and delivery of specified articles of personal property which were accidentally destroyed by fire before the time for delivery. Dexter v. Norton, 47 N. Y. 62. In a subsequent case in the same court, in an opinion delivered by the same judge, it was held that, under a contract to deliver a certain manufactured article within a specified time, the destruction by fire of the defendant's rolling mill, which prevented the defendant from completing its contract by the time fixed in the agreement, did not excuse the defendant's failure to perform the contract, even though the accident prevented performance. Booth v. Mill Co., 60 N. Y. 487. The third class comprises contracts for purely personal services, where the life or health of the contracting party is essential to the execution of the contract. Robinson v. Davison, L. R. 6 Exch. 269. Cases in the first and third classes have no relevancy to this litigation. Cases in the second class, of which Taylor v. Caldwell is the leading case, were decided upon executory contracts, and proceed on the ground that the existence of the subject-matter of the contract at the time of performance was a condition upon which the contract itself took effect. In Taylor v. Caldwell, the music hall was destroyed by a cause *ab extra* before the time for the performance of the contract, and, performance having become impossible, the contract was entirely put at an end as to both parties. In this case the interruption of the delivery of water by the breaking of the pipe was a temporary interference with the performance of the plaintiff's contract. The failure to deliver water for the period required to repair the break did not justify either party in rescinding the contract as for a breach of condition. The case cited from the Massachusetts courts establishes that fact conclusively. Foundry Co. v. Hovey, 21 Pick. 417. The defendant's factory was, at the time of the breach of this contract standing, in a condition to receive and use water. Its destruction is alleged to have been due to the failure of the plaintiff to supply water. It was not due to any antecedent cause *ab extra*, and the plaintiff cannot set up the destruction of the premises, imputable to its own breach of contract, to discharge it from the consequences of its failure to perform one of its terms. If the plaintiff's waterwork had been accidentally destroyed, in an action by the defendant for not continuing to supply water under the contract, or in a suit against the defendant for the payments reserved for the use of water after the destruction of its factory, under the ruling in Taylor v. Caldwell, a different question might have arisen. Decisions in this aspect cannot be permitted to have application to the circumstances of this case, unless Paradine v. Jane, Alleyn, 26, Trustees v. Bennett, 27 N. J. Law, 513, and the long line of cases, English and American, holding the principles adjudged in those cases, are set aside."

CONTRACTS UNILATERAL AND BILATERAL.

I.

Promises may be either in consideration of promises or in consideration of performance. Contracts of the latter class are described as unilateral; those of the former bilateral. In the case of a unilateral contract compliance with the conditions of the promise is all the evidence required of the promisee's assent, and it is not necessary to show that the plaintiff notified the defendant that he accepted his offer and would perform the condition. The English Smoke Ball Case[1] is a recent illustration of this class of promise. The proprietors of a patent medicine, called The Carbolic Smoke Ball, offered in an advertisement to pay £100 to any person who, after having used the

[1] Carlill v. Carbolic Smoke Ball Co., 1 Q. B. 468, 2 Q. B. 484.

smoke ball for a certain period, contracted influenza. The plaintiff, upon the faith of the advertisement, purchased a smoke ball, used it for the time and in the manner specified, but nevertheless contracted the disease. It was held that the defendant was liable for the £100. It was argued for the defendant that he had received no notice of the acceptance by the plaintiff of his offer, and that offer and acceptance were essential to every contract. But the answer to this course of reasoning is that the person making the offer has a right if he pleases to dispense with notice of acceptance, and that if the form of the offer shows that this was not to be required, then it is not necessary. Advertisements which ask that something be done are offers of this kind, and persons reading them have a right to believe that it is the thing to be done, and not the notice of acceptance that the offerer desires. As very well said by Bowen, L. J., in this case, if I advertise that I will give any one five pounds who finds and restores my dog, I do not expect that people will come to me and tell me they intend to hold me to my offer and will try to earn the five pounds. I expect them to go to work and look for the dog.

A more recent Missouri case[2] is another apt illustration of the principle. The University of the State, in its catalogue for 1892-93, announced that applicants for admission to the law department were required to pay $50 for the first year and $40 for each successive year. The plaintiff in 1892 paid $50 and was admitted to the junior class. The catalogue for 1893-94 stated that law students in all classes were required to pay $50 a year. In 1893 the plaintiff tendered $40 as the fee for admission to the senior class, which was refused, and he paid the $50 under protest. It was held that he was entitled to recover the $10. The student by entering the junior class and paying the $50 accepted the defendant's offer, and no other notice was essential. It was the offer of a promise for an act. No one was obliged to accept the defendant's offer; but any one was entitled by its very terms to do so, and the plaintiff having done so the contract was complete and binding on the defendant. It is true the plaintiff was not under any obligation to take the second year's course, but the defendant had not required any promise from him of this kind. The defendant's offer might have said that any person entering the junior class and *agreeing* to take the whole course would be entitled to the stated terms, and in such a case this would have been an offer of a promise for a promise, and if no promise had been made before the withdrawal of the offer there would be no contract. But the defendant chose to make its promise in consideration of the plaintiff's doing something, *i. e.*, entering the junior class and paying $50, and this the plaintiff did.

These two cases and the doctrine they announce is in no wise a denial of the well settled principle in the law of contracts that both parties must be bound or neither will be bound; because such a promise is simply a continuing offer which may be revoked or withdrawn at any time before the person to whom it is made does that which he is asked to do. Nor is the doctrine in any sense a new one. More than fifty years ago, Maule, J., said that there was a large class of cases mentioned by Pothier where A promises to do something if another party, B, will do something else. This contract in the civil law is not binding on B, but if he does the act it becomes binding on A.[3] In an English case, a little earlier in date,[4] Patterson, J., observed: "If I say that if you will furnish goods to a third person I will guaranty the payment, you are not bound to furnish them, but if you do furnish them in pursuance of the contract you may sue me on the contract." So where the action was brought on an instrument in these words: "I hereby guarantee to you, Messrs. K & Co., the sum of £250 in case that Mr. P should default in his capacity of agent and traveler to you," the court said that there was no binding contract on the plaintiffs; notwithstanding the guaranty they were not obliged to employ P. But where a person said, "in case you choose to employ this man as your agent for a week, I will be responsible for all such sums as he shall receive during that time, and neglect to pay over to you" the party indemnified was not bound to employ the person designated, but if he did the guaranty took effect and became binding on the party who gave it.[5]

[2] Niedermeyer v. Curators, 61 Mo. App. 654.

[3] Fishmongers Co. v. Robertson, 5 M. & G. 171.

[4] Morton v. Burn, 7 Ald. & Ell. 19.

[5] Kennaway v. Trileavan, 5 M. & W. 498.

The American reports likewise contain a number of cases sustaining this principle.[6] In *Patton v. Hassinger*,[7] a man of full age became ill while working for the plaintiff, and was nursed and taken care of by him. His father on learning what had occurred declared, although not in the plaintiff's presence, that whoever took care of his son should be well paid. These words were related to the plaintiff, who continued to provide for the son till he died, and subsequently called on the father for compensation, when the latter admitted his liability and said he would pay as soon as he had the means. A suit having been brought against the father, it was held that as the plaintiff had rendered the stipulated service he was entitled to recover, although he had not announced his intention to the defendant. In a Massachusetts case[8] a promise of the defendant to indemnify the plaintiff if he executed a writ which he held as sheriff was decided to be binding on proof that the levy had been made and returned, although the plaintiff did not signify his intention to accept or act under the promise, the only manifestation of his assent being the doing of the act required. "If" said Wilde, J., "A promises B to pay him a sum of money if he will do a particular act, and B does it, the promise thereupon becomes binding, although B at the time of the promise does not engage to do the act. In the intermediate time the obligation is inert or the promise suspended, and until the performance of the condition there is no consideration and the promise is *nudum pactum;* but on the performance of the condition by the promisee it is clothed with a valid consideration which relates back to the promise, and it then becomes obligatory. So if a reward be offered for the apprehension of a culprit or for the doing of any other lawful act, the promise when made is *nudum pactum;* but when any one relying upon the promised reward performs the condition, this is a good consideration for the previous promise, and it thereupon becomes binding on the promisor."

The every day case of a written order for goods is in point. A man mails an order for certain goods to be sent to him; he receives no reply; the first intimation that the vendor intends to accept the order is the arrival of the goods. Now if the order is a positive direction to send the goods, it will be enough that the vendor has done so without his having previously notified the vendee of his intention to send them, and to accept the offer. Thus, in *Cooper v. Altimus*,[9] C wrote to A inquiring if he had staves to sell, and A answered: "If you would let me know how much you would give I could get four thousand at $50 per thousand." C replied: "If they are rift staves and good, I will give $35 per thousand delivered at the station." A sent the staves without answering, but they were rejected by C on the ground that his last letter was an offer which should have been accepted in order to complete the contract. The court held that the letter was an order which did not call for a reply, and became obligatory on him when the staves were tendered in accordance with its terms.

The act called for by the offer must be done while the offer is in force, and it is in force until it has lapsed either by the (a) act of the offerer or by (b) operation of law.[10]

(a) The offerer may prescribe in the offer the time within which it is to be in force, and on the expiration of that time it comes to an end without any further act or notice on his part.[11] A says to B if you will cut my lawn between now and Monday I will pay you $5. Until that time B may earn the $5 by cutting A's lawn, but not if he delays going to work until after Monday. Or A, having made the offer without prescribing any time, may withdraw it before it is acted on by B. If A promises B to pay him $100 if he will cut down a tree on A's land, A may, at any time before B has acted on the offer, notify B that the offer is at an end. And even though the promise is to pay the $100 if B will cut down the tree at any time within a year, A may nevertheless countermand his request at any time before the work is actually begun, and if B insists on proceeding it will be at his peril.

Until, however, the time fixed in the offer has expired, or the offerer has actually withdrawn it, it may be turned into a contract by acceptance. All the authorities agree on this;

[6] See Lent v. Padilford, 10 Mass. 230; Duval v. Trask, 12 Mass. 154; Barnes v. Perrine, 7 Barb. 202; Morse v. Bellows, 7 N. H. 549.

[7] 69 Pa. St. 311.

[8] Train v. Gold, 5 Pick. 380.

[9] 62 Pa. St. 486.

[10] Lawson, Contr. § 31.

[11] Lawson, Contr. § 31; Sherley v. Pehl, 54 N. W. Rep. 287.

even the case of *Cooke v. Oxley*, which has been strangely misunderstood by a number of judges and writers[12] supports this principle. In *Cooke v. Oxley*[13] the declaration was that the defendant proposed to sell and deliver 266 hogsheads of tobacco to the plaintiff at a certain price, whereupon the plaintiff desired the defendant to give him time to agree to or dissent from the proposal till the hour of four in the afternoon of that day, to which the defendant agreed, and thereupon promised the plaintiff to sell and deliver the tobacco upon the terms aforesaid, if the plaintiff would agree to purchase the same and give notice to the defendant before four in the afternoon of that day. The plaintiff then averred that he agreed to purchase the tobacco and gave notice thereof to the defendant before the hour of four arrived, and offered to pay the price, but that the defendant refused to comply with his promise. A verdict having been rendered for the plaintiff, the judgment was arrested. But the decision turned on a point of pleading. The contract declared on, that the defendant would give the plaintiff until four in the afternoon to decide, was clearly not a binding contract at all,[14] and the declaration did not show with sufficient distinctness that the defendant had not withdrawn the offer before the plaintiff notified him of the acceptance. Since the decision in *Boston & Maine R. Co. v. Bartlett*,[15] the rule as stated at the beginning of this paragraph has not been disputed either in this country or in England. In this case the defendant offered to sell certain lands to the plaintiffs for a certain sum if they would accept within thirty days, and before the time was up or the defendant had withdrawn the offer they accepted. It was held that there was a complete contract which would be enforced in equity. The promise, the court said, when originally made was without consideration, and did not constitute a contract. It was a mere offer, and might as such have been withdrawn at any time before acceptance. When, however, the defendants assented, the minds of the parties met, and it was too late for either to recede without the consent of the other. The acceptance then related back to the offer, and the case became in all respects such as it would have been if both had occurred simultaneously. In France, Scotland, Holland, and the other countries which followed the civil law, a man who gave another until a future day to decide whether he would accept an offer, could not withdraw it before the day arrived. Much might be said in favor of this rule and to show that the party who was injured by the breach of such an engagement should have redress. In England and the United States, however, a consideration was indispensable, and where none existed the contract was invalid. A promise to sell might be withdrawn notwithstanding an assurance that it should remain open for consideration. If, however, it was accepted before being revoked, the contract was as obligatory as if both promises were simultaneous.[16] Here as in other like cases, if both parties meet, one prepared to accept and the other to retract, whichever speaks first will have the law with him; and this question is one of fact to be decided by the jury.

(b) If no time is fixed within which the offer is to be accepted, then the law says that it will lapse after the expiration of a reasonable time.[17] The person who makes the offer is presumed to act in view of existing circumstances, and the person to whom it is addressed ought not to lie by until these have changed. He must therefore decide forthwith; otherwise an offer might be accepted after the lapse of months or years, and when the state of things was no longer the same. If an article is exposed for sale to-day at a certain price, and the buyer does not agree, a larger sum may be asked to-morrow when he returns prepared to buy. An offer to sell sent through the mail must be accepted by the first post which leaves during business hours of the following day; and if it be not, the vendor may dispose of the goods

[12] "In the text books in America," says Benjamin (Benj. Sales, § 64), "there has been a singular and almost unanimous attack upon the authority of Cooke v. Oxley."

[13] 3 Pac. Rep. 653.

[14] For the reason as we have just seen that there was no consideration for the promise, because it is well settled that if A makes B an offer and says that B may have a day or a month in which to accept, A may withdraw it at any time he pleases before it is actually accepted. Lawson, Contr. § 27. And see the later cases of Stensgard v. Smith, 43 Minn. 11; Coleman v. Applegarth, 68 Md. 21; Smith v. Bateman (Colo.), 46 Pac. Rep. 213; Crandall v. Willig (Ill.), 46 N. E. Rep. 955.

[15] 3 Cush. 224.

[16] See Lawson, Contr. §§ 27, 29, and cases cited; Cooper v. Lansing Wheel Co., 94 Mich. 272.

[17] Lawson, Contr. § 31, and cases cited; Sherley v. Pell, 54 N. W. Rep. 267.

as he thinks proper. The use of the telegraph to make the offer implies a still shorter limitation of time, and hence it has been held that an offer made by wire on one day could not be accepted the next day.[18] The cases just cited are all cases where a promise was asked in return for a promise, but the rule is just the same where one offers a promise for an act. Thus in an English case[19] where the defendant wrote on the 8th of October requesting an allotment of fifty shares in a joint stock company, and the allotment was not made until the 23d of November, judgment was given for the defendant on the ground that there had been an unreasonable delay. So in a leading case in Massachusetts, a reward for the arrest of a criminal was held to have *ipso facto* expired after a reasonable time, although never actually withdrawn, and that one who had arrested a criminal three years after its publication was not entitled to avail himself of the offer.[20]

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[18] Minnesota Oil Co. v. Lead Co., 4 Dill. 434; James v. Fruit Jar Co., 69 Mo. App. 207.
[19] Ramsgate Hotel Co. v. Monteford, L. R. Ex. 101.
[20] Loring v. Boston, 7 Metc. 407.

MECHANICS' LIENS—PROPERTY OF MARRIED WOMAN—AGENCY OF HUSBAND FOR WIFE—EVIDENCE—PRESUMPTIONS.

RUST-OWEN LUMBER CO. v. HOLT.

Supreme Court of Nebraska, March 21, 1900.

1. A mechanic's lien in favor of a principal contractor grows out of the contractual relations between the owner of the property improved, or his authorized agents, and such principal contractor; and the right thereto is based upon contract, and for the purpose of securing debts due thereunder.

2. Under our statute which provides that any person who shall perform any labor or furnish any material for the erection of any dwelling house by virtue of a contract or agreement, expressed or implied, with the owner thereof, shall have a lien to secure the payment of the same upon such house and the lot of land upon which the same shall stand, a mechanic's lien cannot be created upon the land of a married woman for work done or materials furnished in improving such lands under a contract with her husband, where the husband acts merely for himself.

3. Whether or not the husband is the agent of the wife is a question of fact, to be determined as other like questions, and will not be presumed from the marital relation alone.

4. The mere fact that the wife has knowledge of the construction by her husband of a building on her property does not of itself establish the agency of her husband with authority to charge such property with a lien for the material used thereon; nor will her mere failure to dissent from the proposed transaction import an intention to bind her real estate to the payment of the debt.

5. From the occupation by the wife with her husband of a building as a family residence, constructed by the husband on the wife's land, a conclusive presumption of ratification of the husband's acts does not thereby arise, so as to make effective a mechanic's lien, where none theretofore legally attached. At most, it is only a circumstance, to be considered with other facts and circumstances for the purpose of determining the question of the alleged ratification.

HOLCOMB, J.: The plaintiff (appellant) began an action in the court below against Annie R. Holt, appellee, on an account under a verbal contract alleged to have been entered into with Isaac J. Holt, her husband, acting as agent, for lumber and material sold for the erection of a dwelling house on the wife's land, and sought to have a mechanic's lien decreed on the premises on which the building was erected. The husband was joined as defendant, as well as the cross petitioner, Label, who sought to establish a like lien for a small bill of hardware (about $16) for the same building. The court found generally for the defendants Holt, and dismissed the action. From this judgment the plaintiff and the cross petitioner, Label, appeal to this court.

The wife was the owner of the property (an unimproved lot in the village of Wymore) upon which the building was erected; her title being evidenced by a deed duly recorded. She testified that she purchased the property with her own money; paying $100 in cash, and securing the remainder of the purchase price, $200, by a mortgage on the premises. The only substantial point of controversy is the agency or authority of the husband to charge the wife's real estate with the liens sought to be enforced. It does not appear from the evidence whether the plaintiff relied upon its supposed right to a mechanic's lien upon the assumption that the husband owned the property; nor does it appear that any effort upon its part was made to ascertain in whom the legal title thereto rested. The original estimate introduced in evidence, among other things, says: "I have this day purchased the following bill of goods, to be used on my lots in the erection of a building for a dwelling house, and for which I agree to pay $225 cash." This is signed by the husband individually, and without reference to the wife, or her interest in the lots she then owned. We think that it is quite satisfactorily established by the evidence that the material was in the first instance sold to the husband on his personal account, and not as the agent of his wife. It cannot be said that the husband had any express authority to obligate his wife to the payment of the account, or to charge her real estate with a lien for the improvements made by him thereon. Under the

pleadings, unless an agency, express or implied, may be inferred from the facts and circumstances surrounding the transactions, the plaintiff is without a remedy as against the wife or her real property, which is sought to be charged with the lien. It is said in Copeland v. Kehoe, 67 Ala. 597: "A building or mechanic's lien is purely statutory. Its character, operation, and extent must be ascertained by the terms of the statute creating and defining it. Of itself, it is a peculiar or special remedy given by statute, bounded and circumscribed by the terms of its creation; and the courts are powerless to take it up where the statute may leave it, and extend it to meet facts and circumstances which they may believe present a case of equal merit, or a necessity of the same kind as the cases or necessities for which the statute provides." Section 1 of chapter 54 (the mechanic's lien law of this State) provides that any person who shall perform any labor or furnish any material for the erection of any dwelling house by virtue of a contract or agreement, expressed or implied, with the owner thereof or his agents, shall have a lien to secure the payment of the same upon such house, and the lot of land upon which the same shall stand. A mechanic's lien in favor of a principal contractor therefore grows out of the contractual relations between the owner of the property improved, or his or her authorized agents, and such principal contractor; and the right thereto is based upon contract, and for the purpose of securing debts due thereunder. It is said in Boisot, Mech. Liens, § 276: "Under statutes that give liens for work or material furnished by virtue of a contract with the owner of the land, a mechanic's lien cannot be created upon the land of a married woman for work done or materials furnished in improving such lands under a contract with her husband, where the husband acts merely for himself;" citing numerous authorities, among which is Bradford v. Higgins, 31 Neb. 192, 47 N. W. Rep. 749. From the evidence in this case, we think it may fairly be said that the wife was cognizant of the fact that her husband engaged in the construction of the building upon the real estate owned by her, but that she took no part in the planning or construction of the building, or in the purchase of the material therefor, or in any way gave directions regarding the labor or material entering into the building. The family lived in rented property in the same town, and it appears that for most of the time the wife was unable to leave her home on account of illness. The evidence discloses that, in the discussion of the subject by the husband and wife, it was understood that he was to pay for the material necessary for the building by working at his trade,—that of carpenter and builder. The wife might very naturally acquiesce in having the proposed building erected by her husband, to be paid for in such manner, and yet most strenuously object if thereby her property was to be incumbered, and probably sold to satisfy the debt secured thereby. She and her husband both deny specifically that she authorized him to act for her, and say that whatever he did was on his own account. The trial court doubtless reached this conclusion, and, unless it is against the clear weight of evidence, the finding ought not to be overturned here, as has frequently been held heretofore.

The wife's right to the control and disposition of her separate property, and to contract with relation thereto, is not to be ignored or regarded with indifference. In that respect she stands upon an equality with all others capable of contracting. The material-man may not sell to whomsoever will buy, and then assert a lien upon real estate improved with such material, without reference to the authority of the person so purchasing to incumber the same. His rights are prescribed by statute, and he can only assert them by a compliance therewith under a contract, expressed or implied, with the owner or her authorized agent. It is true that a married woman, by remaining silent regarding a contract of her husband, who, to her knowledge, assumed to act as her agent, and by acquiescing therein, is estopped from denying such agency. In this case, however, we find no element of estoppel. The husband did not contract as her agent, and the plaintiff was charged with notice by the public records that she was the owner of the land upon which the building was to be erected. Whether or not the husband is the agent of the wife is a question of fact, to be determined as other like questions, and will not be presumed from the marital relations alone. The mere fact that the wife had knowledge of the construction of the building by her husband on her property does not, in our judgment, of itself necessarily establish the agency of her husband, with authority to charge such property with a lien for material used thereon; nor will her mere failure to dissent from the proposed transaction import an intention to bind her real estate to the payment of the debt. In Ziegler v. Galvin, 45 Hun, 44, in a case similar to the one at bar, and in construing a like statute, the court says: "We are aware that this conclusion may result in a loss to the plaintiff, and seem a hardship, inasmuch as her property has been benefited by the plaintiff's labor; but this cannot change the effect of the statute, or be considered in construing the same. Contractors and subcontractors must conform to its provisions, for they cannot be changed to meet the exigencies of individual cases. The wife who has a homestead coming through her mother may be willing, even pleased, to have her husband repair and improve the same; and yet, if she has no income or resources with which she can pay for the repairs or improvements, she might not have consented or have been willing that they should be made, if, in order to pay for the same, she had to submit to a sale of her homestead." The views thus expressed seem to be sound, and meet with our approval.

It is suggested that the wife ratified all of the

husband's acts by occupying with the husband the house constructed upon her land. We cannot agree with counsel's contention in this respect. This is carrying the rule of ratification further than we are willing to go. The building was intended as a family residence. The husband had obligations resting upon him as the head of the family, and it was incumbent upon him to provide them a home. As before stated, his wife could very properly consent to his constructing a building on her property for a residence, without intending thereby that he should act as her agent or incumber her real estate, and thus entirely deprive her of it by its sale to satisfy such incumbrance. In Garnett v. Berry, 3 Mo. App. 197, the syllabus reads: "Authorization or ratification of a contract to build a house on the wife's lot will not be presumed from the fact that the house was to be a residence for the wife and children, with the husband." In the opinion, says that court: "Plaintiff claims in the present case that the wife's authorization or her ratification of the contract may be assumed from the fact that the house was to be a residence for herself and children, with her husband. * * * But here it was no part of Mrs. Chamberlain's duty or care to provide a house for herself and her children. That was incumbent on the husband and father. The occupancy of the premises was his beneficial use, and not hers." We do not think that from the occupation by the wife with her husband of a building as a family residence, constructed by the husband on the wife's land, a conclusive presumption of ratification of the husband's acts thereby arises, so as to make effective a mechanic's lien where none theretofore legally attached. At most, it is only a circumstance to be considered with other facts and circumstances for the purpose of determining the question of the alleged ratification. The judgment of the lower court is supported by sufficient competent evidence, and is therefore affirmed; this, however, without prejudice to a future action against the husband for the debt due on the accounts sued on. Affirmed.

NOTE.—*Recent Cases on Mechanic's Lien on Property of Wife for Improvement Contracted by Husband.*—Where lumber is purchased by the husband in his own name, and used in improving his wife's property, and the credit is given solely to him, there is no lien therefor on the property. Hawkins Lumber Co. v. Brown (Ala.), 14 South. Rep. 110. A husband, in charge of his wife's lot, who contracts for a building on it, which he lets, and appropriates the rents, is an "owner or proprietor," under Rev. St. § 6726, defining as such a person for whose immediate use or benefit a building shall be erected, and the building is subject to lien of the contractor. Kline v. Perry, 51 Mo. App. 422. Rev. St. § 6705, requiring, as a basis for a lien, the furnishing of labor or material on land by virtue of a contract with the owner or proprietor, gives no lien on a wife's land for a building erected on it by contract with her husband, though she were cognizant of the erection. Kline v. Perry, 51 Mo. App. 422. Where the architect for a building on the wife's lot is hired by both husband and wife, and the wife knows of the improvements, gives a mortgage for money borrowed to pay for it, and makes payments thereon; takes personal supervision of the work, and forbids changes ordered by her husband; makes the contractor leave the work for not doing it as she wishes, and collects the rents,—there is evidence that she was a party to her husband's contract with the building contractor. Chicago Lumber Co. v. Mahan, 53 Mo. App. 425. On *scire facias* against a husband and wife to enforce a mechanic's lien, it appeared that the building was built on land of the wife, and that she had full knowledge of the contract made by her husband, and had conversed with the husband and contractors in regard to the work, and made no objection at any time during its progress. Held, that the wife was liable. Jobe v. Hunter, 165 Pa. St. 5, 30 Atl. Rep. 452. Evidence that a husband signed a contract for street work in front of a lot the record title to which was in the wife, and stated to the contractors that the lot was community property, will sustain a finding that he was the "reputed owner," within Code Civ. Proc. § 1191, as amended, providing that any person performing work on a street in front of a lot at the request of the "reputed owner" shall have a lien on the lot for work and materials. Santa Cruz Rock Pav. Co. v. Lyons (Cal.), 43 Pac. Rep. 599. Where one contracts by instrument under seal in his own name for building on land belonging to his wife, which ownership, however, is not disclosed by the contract, a mechanic's lien cannot be had against the property, on the ground that the wife is an undisclosed principal, under Act July 1, 1874, § 1, giving right to a lien only where labor or material is furnished by contract with the owner of the land. Walsh v. Murphy (Ill. Sup.), 47 N. E. Rep. 354. Where the evidence shows that the wife knew that her husband had contracted for the erection of a building on her land, and that she acquiesced in its erection, she is bound. McDonnell v. Nicholson, 67 Mo. App. 408. In an action against husband and wife to foreclose a mechanic's lien, where it was shown that the land was owned by the wife, that she knew of the improvements, had helped to select material, had directed the work, and had evinced an expectation to pay for work and material, it was error to enter a nonsuit. Foskett & Bishop Co. v. Swayne, 70 Conn. 74, 38 Atl. Rep. 893. The husband contracted for improvements upon the wife's property. She lived on a part of the premises during the progress of the work, gave orders to the men in relation to the work, caused some changes to be made, received some of the material herself, and informed various parties in interest that her husband was her general agent. Held, that the contractors were entitled to a mechanic's lien of the premises. Interstate Building & Loan Assn. v. Ayers, 71 Ill. App. 529. A mechanic's lien cannot be charged against the wife's real estate where the husband made the contract for improvements in his own name, without apparent authority of the wife, though she saw the improvements while they were being made, and made no objection, and even offered a suggestion regarding them. Alexander v. Perkins, 71 Mo. App. 286. One who furnishes material to the husband of one who owns a lot for a building on the lot, where the husband makes all contracts relating thereto, and the owner lives on the lot while the building is being erected, and subsequently ratifies the contract for material, is entitled to a mechanic's lien, although the husband's agency and the name of his principal were not disclosed when the contract was made. Interstate Building & Loan Assn. of Bloomington v.

Ayers, 177 Ill. 9, 52 N. E. Rep. 342. When the contract to erect a building upon the wife's lot is made with the husband, in the belief that he is the owner (the contract stating such to be the case), if the wife, with full knowledge, approves of all his acts with reference to the making of the contract and the construction of the buildings, she will be estopped from asserting her title, as against the contractor, notwithstanding the contract by the husband was a sealed instrument. Prendergast v. McNally, 76 Ill. App. 335. Where the owner of property objected, and told her husband, in the presence of a lightning-rod agent, that, if he had lightning rods erected, he must pay for them, no lien for the work exists against the property, on the theory of the husband's agency. James v. Dalbey (Iowa), 78 N. W. Rep. 51. When land which is really the separate property of a wife appears on the records as community property, a material man who is informed by the husband that it is his property, and who, without notice that it was the wife's separate property, furnishes material to erect a house thereon, may enforce a mechanic's lien against the property. Hord v. Owens (Tex. Civ. App.), 48 S. W. Rep. 200.

JETSAM AND FLOTSAM.

JURISDICTION IN GARNISHMENT OF DEBTS.

What jurisdictional facts are necessary to give validity to proceedings in the garnishment of a debt is a question difficult of solution in the actual state of the authorities. It may be stated generally that the trend of decision declares that a debt has, for the purposes of attachment, a *situs*, and that this *situs* must be within the jurisdiction of the court where relief is sought. Within this general rule there is a marked conflict of opinion where this *situs* is to be found. The prevalent view would seem to be that the *situs* of a debt for the purposes of garnishment is at the domicile of the debtor, the garnishee. Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710; Nichols v. Hooper, (Vt.), 17 Atl. Rep. 134. The *situs*, however, may be at the domicile of the creditor; of course, to attach the debt there must also be service of process on the debtor, who accordingly must be capable of being reached at the creditor's residence. Louisville & N. R. Co. v. Nash (Ala.), 23 South. Rep. 825. Again, if the debt is a judgment debt it can only be seized at the place where the judgment was rendered, provided as before service of process can be had on the garnishee. Noble v. Thompson Oil Co., 79 Pa. St. 354. Still another view, while recognizing that the debt has a *situs*, insists that, wherever the garnishee could be sued by the principal defendant, the creditor, there the debt may be attached. Wyeth H. & M. Co. v. Lang, 127 Mo. 242. This far reaching rule, which conceives of the debtor as carrying the obligation with him wherever he goes, is anomalous and based on no sound reason.

Two recent decisions take different positions,—one regards the domicile of the creditor as material, the other that of the debtor. In Central of Georgia Ry. Co. v. Brinson (Ga.), 34 S. E. Rep., the debtor was a resident, the principal defendant a non-resident, who was not served on personally, and jurisdiction was denied because the *situs* of the debt for the purposes of garnishment is at the domicile of the creditor. In King v. Cross, 20 Sup. Ct. Rep. 131, it was held that the garnishment of a resident debtor for a debt due to a non-resident defendant was not void. As a matter of principle it is hard to see how anything incorporeal, without length, breadth, or thickness, such as a debt, can have any *situs*. For some purposes, however, such as taxation and administration, a chose in action is treated as if it had a *situs*. Here, too, attachment is a case where it must be treated as a chattel. Ordinarily speaking, no court can be said to control the debt and compel the debtor to pay and the creditor to accept payment but the court which has jurisdiction over both those parties. If, however, the debtor and the place of payment be within the jurisdiction, the court may well compel the debtor to pay over and declare a discharge; and only in those two cases can a valid discharge of the debt be decreed. 12 Harv. Law Rev. 214. In the light of this the actual result reached in the Georgia case would seem correct, since neither the creditor nor the place of payment were within the control of the Georgia court. The point has come before the Supreme Court of the United States twice during the last year, and this is of much practical importance. The decisions following the weight of authority will probably settle the question in this country for the future,—the *situs* of a debt for the purposes of attachment will be at the domicile of the debtor.—*Harvard Law Review.*

INJUNCTION AGAINST GOVERNOR.

An injunction to prevent the occupant of the governor's chair from acting as executive, on the ground that he was not legally elected to the office, although he had been inaugurated and seated in due form, is believed to be an unprecedented interference by the judiciary with the executive department.

The fundamental doctrine of the separation of our executive, legislative, and judicial departments of government plainly condemns any attempt by the courts to control a governor's executive or political acts. It is well said in Bates v. Taylor (Tenn.), 3 L. R. A. 316, that "a State's judiciary sustains the same relations to its governor that the Federal judiciary does to the President of the United States; and, as a State court, by reason of that relation, has no jurisdiction to coerce or restrain the governor with respect to his official duties, so the Federal courts for the same reason have no power to interfere with the official actions of the President." With respect to the President this doctrine was established by the Supreme Court of the United States in the case of Mississippi v. Johnson, 4 Wall. 475, 18 L. Ed. 437. The court refused leave to file a bill for an injunction to restrain the President from performing executive and political functions under an unconstitutional act. Chief Justice Chase, writing the opinion, compared this with an attempt to compel the President to perform such duties, which he says was justly characterized by Chief Justice Marshall as "an absurd and excessive extravagance."

In the recent disgraceful, humiliating, and tragic medley of events in Kentucky an injunction to prevent Governor Taylor from exercising the duties of the governor's office was based on the theory that he had no title to the office but was in reality usurping its functions. The power of the courts to decide a disputed title to the office of governor in *quo warranto* proceedings is sustained in State *ex rel.* Morris v. Bulkeley (Conn.), 14 L. R. A. 657, where the court said: "It is no infringement upon the executive powers to decide who is chosen governor. To decide what person is lawfully elected to any office is a judicial process, and, where there is no tribunal specially authorized to

make such decision the courts must decide. And the courts always have jurisdiction, unless the decision of the special tribunal is final and conclusive." But the established mode of procedure in such cases is by *quo warranto*. The authorities are clear that the writ of injunction "cannot be made, directly or indirectly, to take the place of *quo warranto* and other similar remedies to try the title to public office." Mechem on Public Officers, § 994. The particular mode of exercising the judicial power to determine a disputed title to office may be thought not very important. Yet in matters of delicate adjustment, such as arise on the border line between judicial and executive power, it is in the highest degree important that courts should keep within the clearly determined boundaries of their own jurisdiction. The situation became critical when Governor Taylor refused to recognize the authority of the injunction by which the court sought so restrain him from acting as governor. Conceding the authority of the court to oust him from his office by *quo warranto* proceedings by no means admits its authority to restrain him from exercising the duties of the office until his lack of title to it had been judicially determined. If the injunction against him was issued without any hearing in opposition to it, it was a case in which the court sought to prevent a duly inaugurated incumbent of the office from exercising its duties without having first made any final judicial determination against his right to the office. In matters so grave opinions should not be urged rashly. But public reasons of the greatest magnitude make it necessary to have the respective rights and authority of the judges and the governor in such a case very clearly defined. In the hope of contributing something to that result, it is here submitted, not dogmatically, but yet with some confidence in the correctness of the proposition, that an injunction to prevent the incumbent of a governor's chair from exercising the functions of the executive office,—at least when issued before any final judicial determination of his title to the office,—is in excess of the jurisdiction of the court, and therefore entitled to no respect.

BOOK REVIEWS.

PRIVATE INTERNATIONAL LAW.

A book of cases with an introductory chapter containing extracts by permission from Dicey on Conflict of Laws, Cooley's Constitutional Limitations, and Cooley's Blackstone. The cases are not new, many of them are quite old, but are well chosen with the view of illustrating international law where contests arise between parties, one of whom is domiciled in this country, and the other in a foreign country, or between parties residing in different States in this country. These cases which have been selected by the author with much good judgment, illustrate with great fullness under the conditions above stated the law pertaining to marriage, divorce, legitimacy, guardians, administration, judgments, corporations, immovables, movables, attachment, contracts, statute of frauds, torts, procedure. Also domicile of students, sailors, apprentices, insane persons, infants, married women, commercial domicile, reverter, domicile in uncivilized countries, domicile of origin and choice. These cases may well be called leading cases, and will afford much aid to the seeker of information analogous to the subjects in these cases discussed. The author is John W. Dwyer, LL. M., instructor of law in the department of law of the University of Michigan. The book contains 520 pages, handsomely printed, bound in buckram. Published by George Wahr, Ann Arbor, Michigan.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCIDENT INSURANCE — Intentional Injuries.—Where an accident insurance policy contains a provision that the insurance should not cover "intentional injuries, inflicted by the insured or by any other person, except burglars or robbers," the insured cannot recover of the insurer for injuries intentionally inflicted upon him by another, not a robber or burglar, who made an assault upon him, even if the injury sustained was not precisely that intended, provided the act was intentional, was directed against the insured, and some injury to him was intended.—MATSON v. TRAVELERS' INS. CO., Me., 45 Atl. Rep. 518.

2. ADMINISTRATION—Administrator's Sale — Jurisdiction.—Where 36 years elapsed after the entry of a decree for an administrator's sale of property by the county court, before any objection was made to the validity of the decree, it will be presumed that the court had jurisdiction to render it, though the decree does not recite that the defendants in the proceedings were served with process; and, in the absence of proof that the court did not have jurisdiction of the defendants, the deed made in pursuance of such sale is valid.—CASSELL v. JOSEPH, Ill., 56 N. E. Rep. 413.

3. ADMINISTRATOR—Claims Against Estate—Bills and Notes.—A decree of probate cannot be collaterally attacked in an action on a note by the indorsee of the administratrix of the deceased payee, by showing the dearth of evidence in the probate court on which letters of administration were given to the assignor.—BENJAMIN v. EARLY, Mich., 81 N. W. Rep. 978.

4. ADMINISTRATOR—Executor's Sale—Delay—Validity of Sale.—Rev. St. ch. 77, § 1, providing that execution shall not issue on any judgment after the expiration of seven years from the time the same became a lien, and chapter 22, § 45, declaring that equity decrees shall be a

lien on all real property on which they shall be decreed to be a lien, subject to the same force and effect and limitations as judgments at law, do not apply to an order for the sale of a decedent's real estate to pay debts, and hence an executor's delay for seven years after the entry of such an order before making a sale does not affect its validity.—KIPPING v. DEMENT, Ill., 56 N. E. Rep. 330.

5. ADVERSE POSSESSION — Burden of Proof.—Where adjoining owners agree on a certain dividing line, one of them going into possession of the lands under the agreement, and remaining in possession up to such line uninterruptedly and exclusively, claiming to own them, for 10 years, gets a title which can be devested only by a conveyance, or by adverse possession by another for the statutory period.—PITTMAN v. PITTMAN, Ala., 27 South. Rep. 242.

6. ANIMALS—Dogs — Injuries — Liability.—Where defendant owned a house and farm, and was the head of the family, and her son, 28 years old, who was the owner of a dog, worked for her on the farm, which she managed, for a portion of the crops grown thereon, she was the keeper of the dog, within Comp. Laws 1897, § 5598, providing that the owner or keeper of a dog assaulting or injuring one traveling the highway shall be liable therefor.—JENKINSON v. COGGINS, Mich., 81 N. W. Rep. 974.

7. ASSIGNMENT FOR BENEFIT OF CREDITORS—Acceptance by Creditors.—Where no creditor is to be a party to an assignment for the benefit of creditors who fails, within a certain time, to assent either by signing the assignment or other writing expressing assent, an oral assent within the time, accompanied by an agreement to assent in writing, furnishes sufficient consideration to make the assignment valid.—ROBERTS v. NORCROSS, N. H., 45 Atl. Rep. 560.

8. ASSIGNMENT FOR BENEFIT OF CREDITORS — Failure to Insure.—An assignee for benefit of creditors, who neglects to use ordinary diligence to procure or to keep up insurance on the assigned property, is liable on his official bond for resulting damages.—HILL v. AMER. SURETY CO. OF NEW YORK, Wis., 81 N. W. Rep. 1024.

9. ATTORNEY'S FEES — Lien.—Notice by plaintiff's attorneys to defendant that plaintiff has given them a lien on the cause of action, as security for their fees, is not sufficient to charge defendant with notice of an assignment to them of a certain interest in the cause of action.—SMELKER v. CHICAGO, ETC. RY. CO., Wis., 81 N. W. Rep. 994.

10. BANKRUPTCY—State Insolvency Act—Effect.—Under Const. U. S. art. 1, § 8, declaring that congress shall have power to establish uniform bankruptcy laws, and the provision of the bankruptcy act of July 1, 1898, that the act shall go into full force and effect on its passage, and that proceedings commenced under State insolvency laws before its passage shall not be affected by it, the operation of the State voluntary assignment law was suspended by the bankruptcy law after July 1, 1898.—HARBAUGH v. COSTELLO, Ill., 56 N. E. Rep. 363.

11. BANKS AND BANKING — Checks — Operation.—The check of a depositor, on a bank in which he has money sufficient to meet it, transfers to the payee, as between him and the depositor, the title of so much of the deposit as the check calls for, to remain in the bank until demanded by the presentation of the check.—RICKERT v. SUDDARD, Ill., 56 N. E. Rep. 344.

12. BENEFICIAL ASSOCIATIONS—Proofs of Death.—Where a benefit certificate is to be void if the assured becomes so far intemperate as to permanently impair his health, the beneficiary is not estopped to claim the mortuary benefit by filing proofs of death containing a physician's affidavit that assured died from alcoholism, without averments that the insurer acted on it, and changed its position to its injury.—MODERN WOODMEN OF AMER. v. DAVIS, Ill., 56 N. E. Rep. 300.

13. BILLS AND NOTES—Corporations — Notes—Execution.—Where the president and secretary of a corporation had no direct authority to sign a note on its behalf, and it did not appear that the corporation had issued other notes, or that such officers had ever attempted to bind it by contract, such note was executed without authority, though the corporation was authorized by its charter to execute notes; since such officers' authority could only be derived from a by-law special order, acquiescence, or ratification of the corporation.—CRAWFORD v. ALBANY ICE CO., Oreg., 60 Pac. Rep. 14.

14. BILLS AND NOTES—Indorsement after Maturity.—If negotiable notes given for the rent of certain land are surrendered for the use of the lessee, or for cancellation, to the justice before whom an action was brought, after maturity of the notes, for possession of the premises, in which action all matters in dispute are settled, possession surrendered, and costs paid, their subsequent indorsement by the lessor after maturity confers no right of action upon the indorsee.—CAMPBELL v. NIXON, Ind., 56 N. E. Rep. 248.

15. BILLS AND NOTES—Negotiability—Bona Fide Purchaser.—One who purchases a note before due, and for a valuable consideration, and without notice of a payment which had been made to the payee, but not indorsed on the note, is entitled to recover the full amount of the note.—HUNTER v. CLARKE, Ill., 56 N. E. Rep. 297.

16. BILLS AND NOTES — Parol Evidence.—Where the legal effect of a note is to bind defendants alone, in the absence of any averment that the name of a company, for which defendants claimed to have acted as board of business managers in the execution of the note, appears on the face of the note as an obligor in such way as to render it doubtful, from the paper itself, which of them, the company or defendants, was intended to be bound, parol evidence is inadmissible to show it was the intention to bind the company, and not defendants.—MORAGNE v. RICHMOND LOCOMOTIVE & MACH. WORKS, Ala., 27 South. Rep. 240.

17. BOND TO JAIL LIMITS—Escape—Voluntary Return.—A principal in a bond to the jail limits conditioned that he would not at any time or in any manner escape or leave the jail limits of the county, who voluntarily, and for a few hours only, left the county named in his bond, and went into an adjoining county, to answer to a criminal charge before a justice of the peace, and immediately thereafter returned to the jail limits, is guilty of an escape, under the conditions of his bond.—SMITH, STURGEON & CO. v. GROSSLIGHT, Mich., 81 N. W. Rep. 975.

18. BUILDING AND LOAN ASSOCIATIONS — Dissolution.—Where the board of directors of a building and loan association resigned, and a new board was elected in their stead, the resigning directors were not entitled to sue out a writ of error in the supreme court in an action by the auditor of public accounts for a dissolution of the association under the homestead loan association act, and alleging for the first time in such court the unconstitutionality of the statutes under which such proceeding was instituted.—MECHANICS' & TRADERS' SAV., LOAN & BLDG. ASSN. OF CHICAGO v. PEOPLE, Ill., 56 N. E. Rep. 346.

19. BUILDING AND LOAN ASSOCIATIONS — Set-Off.—In an action by an assignee of an insolvent building and loan association to recover a loan made to one of its members, such member cannot set off against such claim dues or stock payments made by him, since members are entitled to payment of their claims as stockholders only after general creditors have been paid.—COLUMBIA FINANCE & TRUST CO. v. THARP, Ind., 56 N. E. Rep. 265.

20. CARRIERS—Conversion.—The refusal of the owner of goods consigned to himself to receive same at destination constitutes an abandonment, and the owner is estopped from afterwards asserting that the carrier had converted them.—BEEDY v. PACEY, Wash., 60 Pac. Rep. 56.

21. CARRIERS—Infected Cars—Loss of Cattle.—It is the duty of a railroad company to furnish shippers of cat-

tie with cars free from contagious cattle diseases, and if it fails to do so, it is liable for loss of cattle caused thereby.—ILLINOIS CENT. R. CO. v. HARRIS, Ill., 56 N. E. Rep. 316.

22. CARRIERS OF PASSENGERS—Carriers—Contract for Transportation.—Where defendants contract to transport a certain number of passengers for plaintiff, on a certain ship,—plaintiff to have the option to send part of the passengers by other ships,—and the ship is wrecked before the time for the performance of the contract, defendants, in order to escape liability for the repayment of money paid on the contract, must furnish other ships, equally safe, and with equal accommodations.—TURNER v. BARNESON, Wash., 60 Pac. Rep. 54.

23. CARRIERS OF PASSENGERS—Negligence — Contributory Negligence.—Plaintiff, a passenger on defendant's train, was standing at the rear door of the coach, viewing the scenery; his left hand resting on the water-closet door to brace himself. The conductor, approaching from behind, opened the closet door, and shut it quickly; catching and crushing plaintiff's little finger, which had slipped into the crevice without his knowledge. Plaintiff testified that the conductor said he saw him there, and ought to have spoken to him, and that he did not hear the conductor approaching. Held, that the questions of defendant's negligence and plaintiff's contributory negligence were for the jury.—ROMINE v. EVANSVILLE, ETC. R. CO., Ind., 56 N. E. Rep. 245.

24. CHATTEL MORTGAGES — Affidavit of Good Faith.—An instrument, in form a chattel mortgage, unaccompanied by an affidavit of good faith, and not acknowledged or recorded, is of no effect as a chattel mortgage as against *bona fide* purchasers and creditors of the mortgagor, under 1 Ballinger's Ann. Codes & St. § 4558.—CARSTENS v. MOYER, Wash., 60 Pac. Rep. 51.

25. CHATTEL MORTGAGE — Payment — Discharge.—A mortgagee does not relinquish his lien on the mortgaged property by taking notes of a third party, when he does not apply the notes in payment of the mortgage debt, and neither cancels nor surrenders the mortgage, and does not surrender or intend to surrender his security.—JOHNSON v. SKOWHEGAN SAV. BANK, Me., 45 Atl. Rep. 501.

26. CONFLICT OF LAWS—Foreign Assignment—Comity.—A voluntary assignment of a non-resident debtor's property, valid under the laws of the State where made, will not be enforced as against a domestic attaching creditor, where the attached property had not been reduced to possession by the assignee.—SMITH v. LAMSON, Ill., 56 N. E. Rep. 387.

27. CONSTITUTIONAL LAW — Excessive Penalties.—Every presumption and intendment is in favor of the constitutionality of an act of the legislature, and courts are not justified in pronouncing a legislative enactment invalid, unless satisfied beyond a reasonable doubt of its repugnance to the constitution.—STATE v. LUBEE, Me., 45 Atl. Rep. 520.

28. CONSTITUTIONAL LAW — License — Innholder.—While the general rule is that any person is at liberty to pursue any ordinary calling without restraint, not encroaching on the rights of others, the business of innholding has always been regarded as a privilege, rather than as a right, and as a public or *quasi*-public occupation, to be regulated by the legislature for the public convenience and good. It is not a natural right.—INHAB. OF DEXTER v. BLACKDEN, Me., 45 Atl. Rep. 525.

29. CONSTITUTIONAL LAW — Withdrawal of Public Lands.—When a person has filed an application for the purchase of tide lands, has paid one-tenth of the purchase price, and has performed all the preliminaries entitling him to a contract therefor, under Laws 1895, pp. 557, 558, §§ 70, 71, he acquires a vested right, which cannot be taken away by Act March 16, 1897, repealing the former act, and making different provisions for the disposition of said lands.—STATE v. BRIDGES, Wash., 60 Pac. Rep. 60.

30. CONTRACT — Annuities — Contract to Devise.—An agreement by an annuitant to devise "all" of her annuity "not used for her support and maintenance during her lifetime" is not void for uncertainty of description, though the amount which will remain is uncertain.—GARARD v. YEAGER, Ind., 56 N. E. Rep. 287.

31. CONTRACTS — Gaming — Enforcement — Foreign Statutes.—Plaintiff lost at a poker in Colorado, and requested defendant, who was present at the game, to pay his losses, which he did. An action was brought in Wisconsin to recover the money so advanced, in which the statute of Colorado in reference to gambling contracts, though not pleaded or introduced in evidence, was admitted to be practically the same as Rev. St. § 4538, providing that all promises, where the whole or any part of the consideration shall be the repayment of money lent or advanced at the time and for the purpose of any game, shall be void. Held, that the agreement sued on was void under the Wisconsin statute, and, in view of the admission made that the Colorado statute by which the case was governed was the same, plaintiff was not entitled to recover.—SCHOENBERG v. ADLER, Wis., 81 N. W. Rep. 1055.

32. CONTRACTS — Mutuality.—An importer's agreement to sell plaintiff all the beer of certain brands which plaintiff should order, at prices to be agreed on, is not enforceable, for want of mutuality.—TEIPEL v. MEYER, Wis., 81 N. W. Rep. 982.

33. CONTRACT—Sale—Good Will.—Where a defendant sold out his business to plaintiff, and agreed not to engage therein, in the same place, for five years, and before the expiration of such time defendant went into such business, in violation of his agreement, and in bitter competition to plaintiff, such act being a willful and malicious breach of his contract, plaintiffs were entitled to recover profits lost during the term, shown, by a balance of probability, to have resulted from defendant's wrongful act, and for any loss to the value of the good will of the business at the end of the stipulated period.—SALINGER v. SALINGER, N. H., 45 Atl. Rep. 558.

34. CONTRACT—Work and Labor—Action for Services.—A contractor suing for work done and men furnished in making frequent repairs in defendant's different factories, and claiming that the work had been ordered by its general superintendent, who had agreed to pay him at the same rate he had been paid by the corporation formerly owning one of such factories, was entitled to introduce a bill previously paid him by defendant for like services rendered in one of such factories at such rate, since it tended to show a recognition of the prices charged.—GLUCOSE SUGAR REFINING CO. v. FLINN, Ill., 56 N. E. Rep. 400.

35. CONVERSION—Measure of Damages.—The measure of damages for the conversion of a buggy by one buying from a purchaser under conditional sale, giving such purchaser the right to use the buggy, is the amount due at the time of the conversion, less any depreciation through use authorized in the contract of sale.—WOODS v. NICHOLS, R. I., 45 Atl. Rep. 548.

36. CORPORATION—Bonds—Validity — Foreign Corporations.—Where bonds were issued by a corporation secured by a trust deed to a foreign corporation, which was required to certify the bonds in the State of its domicile, and was authorized to take possession of and manage the property mortgaged, the fact that such corporation could not act as such trustee by reason of its failure to comply with the laws of Illinois, did not render such bonds nor the mortgage securing them invalid, since, if the trustee was incapable of acting, a competent trustee might be appointed by the court.—MORSE v. HOLLAND TRUST CO., Ill.; 56 N. E. Rep. 369.

37. CORPORATIONS — Dissolution — Reorganization.—The stockholders of a corporation in embarrassed circumstances voted to reorganize the same, apply its assets in payment of its debts, cancel the old stock, and issue new stock of the reorganized company to each of the old stockholders, in proportion to their previous

holdings on payment of the par value thereof in cash. The business of the old corporation was closed, and all its stock declared canceled. Held, that a purchaser of the interest of a stockholder in the old company was not entitled to compel the reorganized corporation to issue stock to him in lieu of the interest so purchased.—STODDARD V. DECATUR CRACKER CO., Ill., 56 N. E. Rep. 827.

36. CORPORATIONS—Negotiable Paper—Indorsement.—Where, under a corporation's articles, an officer was given general charge, control, and management of its affairs, and authority to sign all contracts and conveyances, he had authority to indorse commercial paper on behalf of the corporation in the regular course of business.—HIAWATHA IRON CO. V. JOHN STRANGE PAPER CO., Wis., 81 N. W. Rep. 1034.

39. CORPORATIONS—Official Bonds—Liability of Sureties.—A bond given by the treasurer of a mutual benefit association during the first year of his election to that office, and conditioned that he should perform his duties faithfully during the term for which he has been elected, and during such further time as he should continue to hold said office, and until he should deliver all the property received as treasurer to his successor in office, is not a continuing bond, and will not bind the sureties therein for defalcations of the treasurer during years subsequent to the first year of his election, where, under the by-laws of the association, such officer is elected annually.—O'BRIEN V. MURPHY, Mass., 56 N. E. Rep. 283.

40. CORPORATIONS—Services Rendered by Officers—Compensation.—The president of a club may recover compensation for services rendered the corporation, on its authority, in letting its building and collecting the rents, where it does not appear that the service was within his duty as president.—FLYNN V. COLUMBUS CLUB, R. I., 45 Atl. Rep. 551.

41. CRIMINAL LAW—Adultery—Confession.—Adultery may be proved by direct confession of the defendant, corroborated by evidence that the woman with whom he was charged with having committed it had been delivered of an illegitimate child.—COMMONWEALTH V. MORRISSEY, Mass., 56 N. E. Rep. 285.

42. CRIMINAL LAW—Assault with Intent to Kill.—Defendant, while driving in a sleigh along a road which had been narrowed by a snow drift, called to the prosecuting witness, who was driving a sled loaded with logs, to give him the road. Witness replied that he could not, and defendant jumped from his vehicle, and, with oath, drew a revolver, and shot at witness. Held, that a conviction of assault with intent to commit voluntary manslaughter would not be disturbed.—KEESIER V. STATE, Ind., 56 N. E. Rep. 232.

43. CRIMINAL LAW—Burglary—Indictment.—An information for burglary alleged that defendant did unlawfully, feloniously, and burglariously, in the nighttime, break and enter into the barn of a person named, with intent feloniously and burglariously to take, steal, and carry away certain pieces of meat, of the value of three dollars, contrary, etc. Held insufficient, in failing to charge that the meat was owned by another than the accused, essential to larceny, which it was sought to allege that defendant intended to commit.—BARNHART V. STATE, Ind., 56 N. E. Rep. 212.

44. CRIMINAL LAW—Fraud of Servant.—In an indictment for wrongfully obtaining money, brought under Code 1896, § 4730, making it a crime to enter into a contract of service, and thereby obtain money or other personal property, and refuse to perform the service, without refunding the money or paying for the property, an averment that defendant failed to refund the money was sufficient, without charging a failure to pay for it.—GILL V. STATE, Ala., 27 South. Rep. 253.

45. CRIMINAL LAW—Grand Larceny.—Since "paper currency of the United States of America, commonly called 'greenbacks,'" designates notes or bills circulated by authority of the United States, judicially known to be of their face value, an indictment charging that accused took and carried away "one hundred and seventy dollars in paper currency of the United States of America, commonly called 'greenbacks,'" is sufficient, without other averment of value.—TURNER V. STATE, Ala., 27 South. Rep. 272.

46. CRIMINAL LAW—Jurors—Separation.—While the separation of the jury in a criminal case without the consent of the defendant may entitle him to a new trial, it does not entitle him to an acquittal.—STATE V. HARRAS, Wash., 60 Pac. Rep. 58.

47. CRIMINAL LAW—Jury—Disqualification—Waiver.—Ignorance of accused's attorney as to the disqualification of a juror will not excuse his failure to interpose a challenge before the juror is sworn, where accused knew the facts constituting the disqualification before the juror was sworn.—YOUNG V. STATE, Md., 45 Atl. Rep. 531.

48. CRIMINAL LAW—Robbery—Larceny.—Robbery includes petit larceny, and hence, under an indictment for the former, defendant may properly be convicted of larceny. On a trial for robbery, an instruction that, if the jury had a reasonable doubt of defendant's guilt, it was their duty to acquit, taken in connection with another instruction that the crime of robbery included that of petit larceny, did not require the jury to acquit of both crimes.—DUFFY V. STATE, Ind., 56 N. E. Rep. 209.

49. CRIMINAL LAW—Witnesses.—The right of a witness to refuse to answer criminating questions rests with himself alone, and a failure of the court to inform a prosecuting witness that he need not answer criminating questions cannot be assigned by defendant as error.—BOLEN V. PEOPLE, Ill., 56 N. E. Rep. 408.

50. DEATH BY WRONGFUL ACT—Action by Personal Representative.—Under Code 1896, § 1751, providing that an action for personal injuries to a servant resulting in death may be brought by his personal representative, an administrator bringing such action was the real plaintiff; and, having removed from the State, he was properly required to give security for costs, under section 1850, providing that, if suit be commenced by or for the use of a resident who afterwards removes from the State, the defendant may require such security.—EX PARTE LOUISVILLE & N. R. CO., Ala., 27 South. Rep. 239.

51. DECEIT—When Lies.—An action for deceit will lie where plaintiff is induced to part with her property to defendant by his deceit and fraud, and she receives nothing therefor, though he promises to pay.—TRUMBULL V. JANUARY, Mich., 81 N. W. Rep. 970.

52. DEEDS—Evidence—Ancient Documents.—Where a deed which plaintiff offered as a link in his title was more than thirty years old, and was received by him from his grantor, its proper custodian, and the grantee in the deed had paid the taxes on the land, though not in actual possession, because the land was wild, unincloused timber land, the deed was admissible as an ancient document, without proof of execution.—WHITE V. FARRIS, Ala., 27 South. Rep. 259.

53. DOWER—Parol Assignment—Validity.—An assignment of a widow's dower by parol agreement between herself and decedent's heirs was not void under the statute of frauds, though it embraced the entire tract occupied by decedent as a homestead, and constituted all of his land, since the assignment of a widow's dower does not create an interest in land, but merely establishes an existing interest, and, being admeasured by value, it might require the entire tract to satisfy her claim.—PEARCE V. PEARCE, Ill., 56 N. E. Rep. 811.

54. EJECTMENT—Defenses.—Where real estate at the time of levy thereon is in the possession of the debtor, it is no defense to ejectment therefor by the purchaser under the levy that intermediate the levy and sale the debtor transferred the possession to defendant, though the latter be the real owner. He must pursue his title by ejectment against the purchaser.—FIEGENSPAN V. DREISIGACKER, Penn., 45 Atl. Rep. 481.

55. FEDERAL COURTS—Appeal—Federal Question.—Judgment of the Circuit Court of Appeals cannot be

held final on the ground that the jurisdiction of the circuit court was dependent entirely upon diverse citizenship, where the plaintiff's declaration claimed that the controversy turned on a construction of the laws of the United States, and both courts below dealt with the case on that assumption.—FLORIDA CENTRAL & PENINSULAR RAILROAD COMPANY v. WILLIAM J. BELL, U. S. S. C., 20 Sup. Ct. Rep. 399.

56. FEDERAL COURTS—Federal Question.—State decisions establishing a rule of property will be followed by the Supreme Court of the United States when called upon to interpret the State law, if it is possible to do so.—STANTON WARBURTON v. MATILDA B. WHITE and AMELIA MCDONALD, U. S. S. C., 20 Sup. Ct. Rep. 404.

57. FRAUDULENT CONVEYANCE—Validity Between Parties.—A fraudulent conveyance, though void as to creditors, is valid as between the parties, passing all the grantor's estate to his grantee.—SHOEMAKE v. FINLAYSON, Wash., 60 Pac. Rep. 50.

58. GAMING—Gambling Contracts—Board of Trade.—Where the parties entered into a partnership with comparatively small capital, and engaged in transactions on the board of trade which involved millions of dollars, and in which vast quantities of grain, etc., were bought and sold, but never delivered or offered for delivery, but differences were paid, the transactions were gambling contracts, and defendant could not be compelled to pay plaintiff a proportionate share of losses incurred by him.—ATWATER v. MANVILLE, Wis., 81 N. W. Rep. 985.

59. GARNISHMENT—Property Subject.—Creditors of a firm cannot by garnishment reach a debt due one only of the partners.—COMMERCIAL NAT. BANK OF PEORIA v. KIRKWOOD, Ill., 56 N. E. Rep. 405.

60. HIGHWAYS—Dedication—Acceptance.—The putting in of a culvert by the highway commissioners under a strip dedicated for a road, the leveling of it off, their subsequent acceptance of a deed from another extending the road, and the fact of travel over the road, is evidence of acceptance.—WOODBURN v. TOWN OF STERLING, Ill., 56 N. E. Rep. 378.

61. HIGHWAYS—Establishment—Prescription.—Where the use of a road over vacant and unoccupied land was by a few individuals in the neighborhood, and not by the public generally, and the line of travel shifted, and was without any well-defined course or limits, the roadway varying from 10 feet to 150 feet, on which no work was done by the public which amounted to an improvement, and nothing else was done to indicate a claim of public right, such use was insufficient to charge the owners with notice that it was adverse, and hence did not establish a highway by prescription.—O'CONNELL v. CHICAGO TERMINAL TRANSFER R. CO., Ill., 56 N. E. Rep. 355.

62. INJUNCTION—City Council—Legislative Power.—The power of the city council being legislative under Rev. St. § 1862, providing that any municipal corporation may grant to a street railway corporation the use, "upon such terms as the proper authorities shall determine" of any streets for tracks, such company to be subject to such rules, regulations and license fees as the proper municipal authorities may by ordinance, from time to time, prescribe, a court has not jurisdiction to enjoin passage of an ordinance giving such use of streets.—STATE v. SUPERIOR COURT OF MILWAUKEE COUNTY, Wis., 81 N. W. Rep. 1046.

63. INJUNCTION FROM FEDERAL COURT AGAINST PROCEEDINGS IN STATE COURT.—An injunction against enforcing claims against Indians in a State court cannot be granted by a federal court under U. S. Rev. Stat. § 720, which prohibits an injunction from a federal court to stay proceedings in any court of a State except in matters of bankruptcy.—UNITED STATES v. PARKHURST-DAVIS MERCANTILE CO., U. S. S. C., 20 Sup. Ct. Rep. 423.

64. INSURANCE—Modification of Conditions.—Where an insurer's general agent modified the condition of an application for insurance, and of the policy subsequently issued, which required full prepayment of the premium as a precedent condition, by accepting a portion of the premium, and extending 60 days' credit for the balance, in violation of the terms of the policy subsequently issued, the insurer is estopped to deny the acts of such agent, or to assert the invalidity thereof, although the policy subsequently issued prohibited modification of its terms, save by a written agreement signed by its president or secretary, of which conditions the insured was not informed when he made his application, and his agreement as to premiums.—COLE v. UNION CENT. LIFE INS. CO. OF CINCINNATI, OHIO, Wash., 60 Pac. Rep. 68.

65. INSURANCE—Policy—Construction.—A policy on a stock of hardware provided that, notwithstanding any usage or custom of trade or manufacture, the keeping, using, or allowing dynamite on the premises should render the policy void, unless otherwise provided by agreement indorsed on or added to the policy. An attached slip provided that the insurance should cover merchandise usually kept for sale in a retail hardware store. Held, that liability on the policy could not be avoided because dynamite was kept in stock, if it were usual to keep it where the stock was located.—PHENIX INS. CO. OF BROOKLYN v. WALTERS, Ind., 56 N. E. Rep. 257.

66. INSOLVENCY—Laborer's Lien—Preference.—Laws 1895, p. 242, amending Act June 15, 1887, provides that debts for labor, against a person whose business shall be suspended by creditors, shall be preferred claims, and first paid in full, and, if there is not sufficient to pay them in full, they shall be paid from the proceeds of the sale of the property seized. Held that, where an insolvent employer's property was sold under a chattel mortgage, his employees were entitled to a prior lien on the surplus, as against a second mortgage on the property taken after the act took effect, but before any of the employee's claims accrued.—HECKMAN v. TAMMEN, Ill., 56 N. E. Rep. 861.

67. JUDGMENT—Corporations—Dissolution—Liability of Stockholders.—A judgment being conclusive on all questions which might have been proved under the issues, stockholders of a corporation sued by creditors' bill on a judgment against the corporation cannot object that a finding that the corporation employed plaintiffs before its charter expired, and while it had power to do so, is not supported by evidence, since the corporation could have interposed a defense of *ultra vires* if its charter had expired.—SINGER v. HUTCHINSON, Ill., 56 N. E. Rep. 388.

68. JUDGMENT OF OTHER STATE—Appointing Administrator.—The appointment of an administrator in a State where the decedent died and where there are immovable property and effects of the estate does not constitute an adjudication that the decedent was domiciled there at the time of his death, where the court did not make and the letters did not recite any finding as to his domicile.—THORMANN v. FRAME, U. S. S. C., 20 Sup. Ct. Rep. 446.

69. LANDLORD AND TENANT—Lease—Measure of Damages.—In an action for failure to give possession of leased premises, where no special damages are alleged, the measure of damages is the difference between the actual rental value of the premises for the term and the rent reserved in the lease.—SERFLING v. ANDREWS, Wis., 81 N. W. Rep. 901.

70. LIBEL—Evidence.—In an action of libel, wherein the alleged libel consisted of a printed advertisement of judgments for sale, posted by the defendant in a public place, it is not competent for a witness called by the plaintiff to give his opinion, in reply to a question by plaintiff's counsel calling for it, as to the purpose of the defendant in posting the advertisement.—SOLOMAN v. AMER. MERCANTILE EX., Me., 45 Atl. Rep. 510.

71. LICENSE—Interstate Commerce.—A territorial statute which imposes a license fee as a condition upon which coal oil may be sold in the territory is unconstitutional and void, in so far as it applies to sales in original packages by the importer of coal oil pro-

duced and refined without the territory.—IN RE WILSON, N. Mex., 60 Pac. Rep. 73.

72. LIMITATIONS—Pleading—New Promise.—Where an original obligation is barred by limitations, and an acknowledgment or promise to pay is made after the statutory period has expired, which is relied on, the action must be brought on the new promise, and not on the original obligation.—RODGERS v. BYERS, Cal., 60 Pac. Rep. 42.

73. MASTER AND SERVANT — Defective Machinery.—A complaint by a servant against his master for injuries caused by unsafe and defective machinery must allege the master's knowledge of the defective or unsafe condition of the machinery, or that by use of ordinary care he could or would have known of such defects.—CREAMERY PACK. MFG. CO. v. HOTSENPILLER, Ind., 56 N. E. Rep. 250.

74. MASTER AND SERVANT — Negligence—Fellow Servant.—Plaintiff's intestate was employed by defendants, at the time of his death, at the bottom of a mine shaft; his duty being to fill the ore bucket, which was hoisted by a horse led by a boy. The employee at the top of the shaft, whose duty it was to dump the ore bucket and let it down to deceased, dropped it without looking to see whether the boy had hooked the rope to the horse, as was the custom, in order to let the bucket down steadily, which he had not done; and the bucket struck deceased and killed him. Held that, though the boy was incompetent to manage the horse, such incompetency was not the cause of the accident, but that it was caused by the negligence of deceased's fellow-servant at the top of the shaft, and hence there was no error in directing a verdict for defendants.—ADAMS v. SNOW, Wis., 81 N. W. Rep. 983.

75. MASTER AND SERVANT — Risks Assumed by Servant.—Plaintiff, while employed in a part of its mill where he had never wokred before, stepped back into a barrel of hot water, located a few feet from where he was working. The barrel was sunk into the ground to a level with the surface, and was used to receive waste steam and water from the engine; and, while the engine was at work, clouds of steam would always be seen arising therefrom. At this time the engine was not at work, no steam could be seen, and pieces of bark were all around the barrel, and some floating on top of the water. The barrel had previously been kept covered, but had been uncovered for some time prior to the accident. Held, that this was not an apparent danger, the risk of which was assumed by the plaintiff.—JOHNSON v. TACOMA MILL CO., Wash., 60 Pac. Rep. 53.

76. MECHANICS' LIENS — Validity — Verification.—Though Hill's Ann. Laws, § 3673, requires a mechanic's lien claimant to file his claim, containing a true statement of his demand, the court will not hold a lien void for a mistake in the claim filed, as to the amount due, where it is made in an honest belief as to its correctness.—COOPER MFG. CO. v. DELAHUNT, Oreg., 60 Pac. Rep. 1.

77. MORTGAGE — Foreclosure.—In an action to foreclose a mortgage of land between the original parties, or those having no superior rights, the mortgagor is not estopped from denying the consideration. The reason is that the debt is the principal thing; the mortgage is only an incident.—BIGELOW v. BIGELOW, Me., 45 Atl. Rep. 518.

78. MORTGAGES—Foreclosure—Abandonment of Mortgage.—A mortgagor abandons his mortgage by putting the notes secured thereby into judgment, and selling the premises on execution to satisfy a balance due on such judgment, and then accepting new notes for such balance secured by an assignment of the sheriff's certificate of sale with an option to hold the sheriff's deed in satisfaction of his claim or as a mortgage.—HANNA v. REEVES, Wash., 60 Pac. Rep. 62.

79. MORTGAGES—Foreclosure — Receiver's Sale.—On sale of mortgaged property by a receiver appointed in foreclosure proceedings, the proceeds are charged with all the priorities and equities which existed as against the property, although the order of sale did not specifically direct that the property was to be sold to pay off the adjudged liens; and hence a creditor of the mortgagor, claiming no special lien against the mortgaged property, who intervenes in the foreclosure suit after sale, and files a claim against the receiver, will not be allowed a preference, although the lienors did not file a claim against the proceeds in the hands of the receiver.—MUELLER v. STINESVILLE & BLOOMINGTON STONE CO., Ind., 56 N. E. Rep. 222.

80. MORTGAGES—Husband's Dower—Release.—Where a mortgagee released his mortgage and canceled and surrendered the notes, taking a deed of the mortgaged land and new notes for the same debt, giving the mortgagor a bond to reconvey on satisfaction of the debt, his interest as mortgagee would not merge in the conveyance, where it was to his interest to keep the same alive, and there was no intention to release the security held by him as mortgagee.—FARRAND v. LONG, Ill., 56 N. E. Rep. 313.

81. MORTGAGES—Releases — Consideration.—A mortgagee, who, accepting a personal promise from the mortgagor, releases the mortgage, and fails for 14 years to seek relief from the relief, after innocent third persons have acquired interests in the mortgaged premises, is guilty of such laches as precludes his setting aside the release and reviving the mortgage.—MCMILLAN v. MCMILLAN, Ill., 56 N. E. Rep. 302.

82. MORTGAGES—Set-Off.—Where, on sale of land, the wife of the vendor signs the deed, cutting off her inchoate right of dower, on the agreement that the purchase money mortgage shall be given to her and in her name, there cannot be set off against the mortgage so given a debt of her husband to the mortgagor.—COLE v. DARLING, Mich., 81 N. W. Rep. 967.

83. MORTGAGE NOTE—Right of Action.—A recital in a note sued on, that it was secured by a mortgage of even date therewith, was *prima facie* evidence of the fact recited, and rendered it not subject to action.—HIBERNIA SAV. & LOAN SOC. v. THORNTON, Cal., 60 Pac. Rep. 37.

84. MUNICIPAL CORPORATIONS—Defective Sidewalk—Contributory Negligence.—The doctrine that a lot owner may construct and maintain a hatchway in the sidewalk, covering the opening when not in use so that it will not affect the safety of the walk, and when in use guarding it reasonably to prevent travelers in the exercise of ordinary care from stepping into it, does not exempt a city from the results of knowingly permitting such an opening to be used in a negligent manner.—WHITTY v. CITY OF OSHKOSH, Wis., 81 N. W. Rep. 992.

85. MUNICIPAL CORPORATIONS — Injuries to Pavement—Rights of Contractor.—A contract relation not existing between a water board and a street-paving contractor, the water board of a city is not liable to a paving contractor for damages to a pavement caused by the setting of a trench improperly filled by the water board before the paving was done, where the contract for paving the street and providing for its repair was entered upon with knowledge of the trench.—GRANT v. BOARD OF WATER COMRS. OF CITY OF DETROIT, Mich., 81 N. W. Rep. 969.

86. MUNICIPAL CORPORATIONS — Negligence.—One excavating a trench across a city street is required to keep it properly guarded, and is not relieved from liability for an injury caused by a failure to do so by the fact that this duty, with his knowledge, had been assumed by a street-railroad company for the purpose of facilitating the movement of its cars.—CITY OF BOSTON v. COON, Mass., 56 N. E. Rep. 287.

87. MUNICIPAL CORPORATIONS — Streets — Telephone Poles.—Telephone poles and wires in a street constitute an additional servitude, for which abutting owners must be compensated; the right of street occupancy, subject to the rights of the owners of the fee, being all that was intended, and all that could be granted, by Terr. Laws 1848, p. 257, giving the right to telegraph companies to construct and maintain their lines on public roads and on the land of individuals

"the owners of the land through which said telegraph lines may pass having first given their consent."—KRUEGER v. WISCONSIN TEL. CO., Wis., 81 N. W. Rep. 1041.

88. NATIONAL BANK — Liability of Next of Kin for Assessments.—The widow and heirs of a shareholder in a national bank, to whom the probate court allots the shares of stock in indivision, in proportion to their interests in the estate, but who let the stock stand in the name of the deceased, without any notice of their title to it, are liable, under U. S. Rev. Stat. §§ 5139, 5151, 5152, to assessments on the stock in case the bank subsequently becomes insolvent.—MATTESON v. DENT, U. S. S. C., 20 Sup. Ct. Rep. 419.

89. NEGLIGENCE — Injuries to Trespasser.—Where plaintiff, while on business in defendant's factory, was accidentally locked in the attic, so that he could not go down the stairway, and he requested one of defendant's workmen to take him down in the elevator, knowing that defendant did not use the elevator, but not knowing that it was out of order, he was a trespasser in using it, and not entitled to damages for injuries received by its fall.—LEAVITT v. MUDGE SHOE CO., N. H., 45 Atl. Rep. 558.

90. OFFICE AND OFFICERS—Liability on Official Bond.—Under Rev. St. p. 363, § 81, prohibiting an officer from using, by way of loan, for his own use, any portion of the funds intrusted to him; and Const. art. 5, § 23, and Rev. St. ch. 53, § 1, both providing, in effect, that officers shall receive the salary fixed by law, in lieu of all "fees, costs, perquisites," etc.,—an agreement by an officer, in consideration of the signing of his bond by his sureties, that he will deposit public funds in their banks, for his and their benefit, is unlawful and against public policy.—RAMSAY'S ESTATE v. WHITBECK, Ill., 56 N. E. Rep. 822.

91. OFFICE AND OFFICERS—Title to Office—Mandamus—Quo Warranto.—Where an office is filled by an actual incumbent, exercising its functions *de facto* and under color of right, *mandamus* will not lie to compel him to turn over the books of the office to another, the question of title to the office being involved; *quo warranto* being the proper remedy.—PIPPER v. CARPENTER, Mich., 81 N. W. Rep. 962.

92. PARTITION—Rights of Heirs—Estoppel.—The heirs of a widow are not estopped from asserting their title to her interest in her husband's realty as against a purchaser under an administrator's sale by the acceptance of a small sum derived from such husband's estate, and distributed to them, it not appearing that any part of such sum was derived from the sale of the widow's interest.—BELL v. SHAFFER, Ind., 56 N. E. Rep. 217.

93. PARTNERSHIP — Action by Partner for Salary.—An agreement between partners that one of their number shall receive a stated salary from the receipts of the firm, and the receipt and conversion by his co-partners of a sum in excess of the salary from such source, does not constitute the co-partners trustees of such specific fund to the use of the salaried partner, for which they may be held liable in an action at law, without regard to the debts of the firm and the liabilities of the several partners to the firm.—DUKES v. KELLOGG, Cal., 60 Pac. Rep. 44.

94. PARTNERSHIP — Notice of Dissolution.— All the partners of a firm which has had continuous dealing with another are liable to him for goods purchased of him upon the credit of the firm after dissolution of it, if he have no notice thereof.—H. H. NEVENS & CO. v. BULGER, Me., 45 Atl. Rep. 503.

95. PHYSICIANS AND SURGEONS—Malpractice.—Under Rev. St. § 4222, providing that no action for personal injury shall be maintained unless, within one year after the accident, notice in writing is served on the person causing the injury, stating the time and place where the accident occurred, the service of such notice is not a condition precedent to a cause of action for malpractice, but is merely a statute of limitation; and hence the objection that such a notice fails to state where the injury occurred is waived, when not raised either by answer or demurrer.—MEISENHEIMER v. KELLOGG, Wis., 81 N. W. Rep. 1033.

96. PLEADING—Joinder of Parties.—Gen. Laws, ch. 238, §§ 20-23, providing that, when a plaintiff is in doubt as to the person from whom he is entitled to recover, he may join two or more defendants with a view to ascertaining which is liable, and that non-joinder or misjoinder shall not defeat an action, does not authorize the joinder in one declaration of a cause of action against one of two defendants for goods sold, and in the second count thereof a cause of action against the other defendant on the ground that he had assumed the payment of the debt sued for in the first count.—PHENIX IRON FOUNDRY v. LOCKWOOD, R. I., 45 Atl. Rep. 546.

97. PROCESS SERVICE—Sufficiency of Notice of Foreclosure.—Personal service on non-residents, outside the jurisdiction of the court, may be sufficient to constitute due process of law in a suit for the foreclosure of a lien upon land within the State.—JOHN E. ROLLER v. STEPHEN HOLLY, U. S. S. C., 20 Sup. Ct. Rep. 410.

98. PUBLIC LAND—Cancellation of Homestead Entry.—The cancellation of a homestead entry upon due notice to the entryman and after a hearing in the case cannot be regarded as a mere nullity, when set up against his mortgagee, because the latter had no notice of the proceeding, but the entry no longer constitutes *prima facie* evidence in favor of such mortgagee.—GUARANTY SAVINGS BANK v. ALBERT BLADOW, U. S. S. C., 20 Sup. Ct. Rep. 425.

99. PUBLIC LAND—Rights of Settler.—The rights of a settler in good faith, who takes possession of public land at a time when there is on record a homestead entry by another person who has never made any settlement, will attach instantly on the filing of a relinquishment of the prior entry, though at the same time one who has paid money for such relinquishment makes a new entry; and the settler may thereafter make an entry and perfect his right to a patent as against the prior entry made by a person not in possession.—MOSS v. DOWMAN, U. S. S.C., 20 Sup. Ct. Rep. 429.

100. QUIETING TITLE.—Where plaintiff's grantor was the owner and in possession of land, and an attempted sale was made by the sheriff under an execution issued on a judgment against another person, who had no claim to the land, the grantor was not guilty of laches in taking no steps to remove the cloud on the title, since laches does not run against an owner in possession until his title is attacked.—SHAW v. ALLEN, Ill., 56 N. E. Rep. 403.

101. RAILROAD COMPANY — Assault on Trespasser—Pleading.—Where the complainant alleged an assault by kicking and striking the plaintiff, and then throwing him to the ground from a swiftly-moving car, a plea in justification, alleging that he was a trespasser stealing a ride, and was ejected by the use of only necessary force, is demurrable, unless it sets forth circumstances showing that defendant's acts were reasonably necessary.—WRIGHT v. UNION R. CO., R. I., 45 Atl. Rep. 548.

102. RAILROAD COMPANY—Grade Crossings—Gas Company—Mains in Streets.—Under St. 1890, ch. 428, § 5, relating to grade crossings, as amended by St. 1891, ch. 123, § 1, providing that all damages sustained by any person in his property by the taking of land for, or by the alterations of the grade of, a public highway, may be determined by a jury in the same manner as damages may be determined when occasioned by the taking of land for the locating and laying out of public ways, a gas company is not entitled to compensation for the expense which it incurred in taking up and relaying its gas mains, occasioned by a change in the grade of the street in which they had theretofore been laid.—NATICK GASLIGHT CO. v. INHABITANTS OF NATICK, Mass., 56 N. E. Rep. 292.

103. RAILROAD COMPANY—Right of Railway Company to Condemn Lands.—A railroad company's right to take lands by eminent domain, so long as it is unex-

ecuted except by merely filing a map of a proposed route, is not vested so as to make the condemnation of the land by the State for other purposes operate as an impairment of the obligation of the contract with the railroad company, when the company was organized under general statutes which provided for the alteration, amendment, or repeal of corporate charters.—ADIRONDACK RAILWAY CO. v. PEOPLE OF THE STATE OF NEW YORK, U. S. S. C , 20 Sup. Ct. Rep. 460.

104. REFORMATION OF INSTRUMENTS—Pleading.—In a suit to reform a deed for mistake in description, a complaint setting out both the true and the false descriptions is a sufficient compliance with the rule requiring such a complaint to distinctly show the original agreement, and point out wherein there is a mistake.—SELLWOOD v. HENNEMAN, Oreg., 60 Pac. Rep. 12.

105. RELIGIOUS SOCIETIES — Incorporation.—Where the articles of incorporation of a church stated that the incorporators "formed themselves into a religious society of the German Evangelical Synod of North America," and a minister of that denomination drew the articles for the purpose of forming a corporation of his church, and they, with the rules of such church, were read and explained at the meeting at which they were signed, such circumstances are sufficient to show the intention.—FRANKE v. MANN, Wis., 81 N. W. Rep. 1014.

106. REPLEVIN — Alternative Judgment.— If, in an action of replevin, an alternative judgment is given, and at the time of the rendition of such judgment no election is made to take the money value of the property recovered, the return of the property before a levy of execution is a satisfaction of the judgment, and thereafter no proceedings can legally be had for enforcing by execution the alternative judgment for the money.—JOHNSON v. GALLEGOS, N.Mex., 60 Pac. Rep. 71.

107. REPLEVIN—Justice's Judgment.—Horner's Rev. St. 1897, § 1505 (Burns' Rev. St. 1894, § 1573), providing that, on reduction of the amount of a judgment rendered in justice court by five dollars or more on appeal to the circuit court, appellant shall recover his costs in the circuit court, applies to alternative judgments in replevin.—TOLBERT v. MILLER, Ind., 56 N. E. Rep. 264.

108. REPLEVIN BOND — Conditions.—Delivery of the chattels to the obligors in a replevin bond being the consideration therefor, the fact that the condition of the bond (an event on the happening of which the bond would become void) was one incapable of performance merely renders the condition void, and not the bond.—WARD v. HOOD, Ala., 27 South. Rep. 245.

109. RES JUDICATA—Chattel Mortgages.—Under a decree of a reference in a foreclosure suit, directing a master to report "what particular property came into the hands of a receiver, and what property and franchises were covered by the mortgage," it was reported that certain specified property came into the receiver's hands, "all of which property and franchises are covered by the mortgage." A part of the mortgaged property not specified in such report had been sold on an execution against the mortgagor, and was in possession of the purchaser, who asserted title thereto, and declined to surrender it to the receiver. Held, that the confirmation of the master's report did not preclude the court from ordering a sale of all the mortgaged property, including that claimed by the execution purchaser.—RUST v. ELECTRIC LIGHTING CO. OF MOBILE, Ala., 27 South. Rep. 263.

110. SALE—Delivery—Conditions.—Where piling were cut by B on land of defendant, on an agreement that they were not to be removed till the payment of stumpage and advances made by defendant, the fact that defendant consented to delivery thereof by B to plaintiffs does not prevent defendant legally repossessing himself thereof after delivery, where his consent was on consideration that plaintiffs should pay such stumpage and advances before the removal, which they failed to do; this not being a condition subsequent, but a condition precedent.—AUSTILL v. HEIRONYMUS, Ala., 27 South. Rep. 255.

111. TAXATION—Corporate Stock — Foreign Corporations.—Starr & C. Ann. St. ch. 120, § 6, cl. 1, requires every resident of the State to list for taxation all his shares of stock in companies the capital stock of which is not assessed in the State. Appellant, a resident of the State, owned and had in his possession certificates of stock in a corporation chartered in Kansas, and all the capital stock of which was invested in property located and taxed in Kansas. Held, that the certificates were taxable in the State.—IN RE GREENLEAF, Ill., 56 N. E. Rep. 295.

112. TAXATION—Who Liable.—Though the supervisor has notice of a deed of lands from L to C, they are properly assessed to L; the deed being made merely as a subterfuge to relieve L from taxation, and it being intended not to place the title absolutely in C, but that L should at least have such control over the lands that it could cut and remove any timber remaining thereon, and have charge and control of any subsequent sales of the lands.—H. M. LOUD & SONS LUMBER CO. v. ELMER, Mich., 81 N. W. Rep. 965.

113. TRESPASS—Railroads—Streets.—A railway company, having become the owner of a canal, and laid its track along the towpath of same, brought an action to enjoin certain other railway companies, that had maintained a bridge over the canal, from appropriating the towpath below the bridge, alleging that it was the owner and in possession of the ground below the bridge, and that defendants were forcibly and without right attempting to appropriate the same. Held, that the action did not involve the question of plaintiff's right to a railroad crossing.—PEORIA & E. RY. CO. v. ATTICA, C. & S. RY. CO., Ind., 56 N. E. Rep. 210.

114. WATERS AND WATER COURSES—Rights of Riparian Owners.—A riparian owner, having a proprietary right in the natural flow of a private stream, cannot lawfully be deprived of it, without compensation, by an upper riparian owner, though the latter is an incorporated water company, or a borough authorized to distribute water to its inhabitants.—IRVING'S EXRS. v. BURGESS, ETC., OF BOROUGH OF MEDIA, Penn., 45 Atl. Rep. 482.

115. WILLS—Power of Executors—Execution.—A will creating a trust for the maintenance of testator's children, and empowering the executor to sell and reinvest the property when deemed by him expedient, confers no authority to continue a mercantile business of the testator, or to purchase goods for that purpose.—EUFAULA NAT. BANK v. MANASSES, Ala., 27 South. Rep. 258.

116. WILLS—Trust—Life Estate.—Under a will giving all the estate to W in trust to pay the "net rents and income thereof" to C during her life, without being subject to the debts or contracts of any husband she may have, the principal, on the death of C, to go to her children, or, she having none, to testator's brothers, the trustee to sell any or all real estate, if the interest or preservation of the estate during the life of C requires it, and the proceeds of such sale to be reinvested, and held in trust for the same uses and purposes as the other property, C has only a right to the net rents and income for life, and the trust is an active and continuing one during her life, though there was no marriage by her in fact or in contemplation when the will was executed.—WOLFINGER v. FELL, Penn., 45 Atl. Rep. 492.

117. WILLS — Vested Remainder — Legacies.—Where testator devised all his property to his wife for life, remainder to the children of his three deceased sisters then living, and, if there should be none living, then to other legatees, and the widow waived the provisions of the will, and elected to take under the statute, the children's legacies were vested and payable on testator's death, subject to be devested on the children's death before that of the widow.—PARKER v. ROSS, N. H., 45 Atl. Rep. 576.